STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
AND OAKLAND COUNTY CIRCUIT COURT

RANDY H. BERNSTEIN, DPM,

Plaintiff-Appellee

v

SEYBURN, KAHN, GINN, BESS AND SERLIN, PROFESSIONAL CORPORATION, a Michigan professional corporation, and BARRY R. BESS, individually,

Defendants-Appellants

SCt No. 149032
LC No. 08-096538-NM
COA No. 313894

APPELLANTS' BRIEF ON BEHALF OF DEFENDANTS SEYBURN, KAHN, GINN, BESS & SERLIN, P.C. AND BARRY R. BESS

ORAL ARGUMENT REQUESTED

EXHIBITS

PROOF OF SERVICE

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STATEMENT OF THE BASIS FOR JURISDICTION

The Supreme Court has jurisdiction over this appeal pursuant to *MCR 7.301(A)(2)* and *MCR 7.302(H)(3),* the Court having on December 12, 2014 granted the Defendants leave to appeal the Court of Appeals Opinion in this matter dated February 20, 2014.

STATEMENT OF QUESTION PRESENTED:

ARE PLAINTIFF'S LEGAL MALPRACTICE CLAIMS BARRED BY THE PERIODS OF LIMITATIONS SET FORTH IN *MCL 600.5805(6)* AND MCL *600.5838* BECAUSE PLAINTIFF FILED HIS COMPLAINT MORE THAN SIX MONTHS AFTER DISCOVERING THE ALLEGED MALPRACTICE AND MORE THAN TWO YEARS AFTER THE DATES OF THE SPECIFIC AND DISCRETE LEGAL SERVICES BETWEEN 1991 AND 2002 OUT OF WHICH THE CLAIMS ARISE?

The Plaintiff-Appellee says "No."

The Defendants-Appellants say "Yes."

The Circuit Court said "Yes."

The Court of Appeals said "No."

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

In 1991, Kenneth Poss, D.P.M., was operating a podiatry practice where Plaintiff, Randy Bernstein, D.P.M., had previously been employed as an associate podiatrist (Complaint ¶5, Apx 58a; Bernstein Dep, Apx 101a-104a, 143a). Due to legal problems, Dr. Poss expected to temporarily lose his license and, therefore, his ability to remain a shareholder of his podiatry P.C. (Complaint, ¶7, Apx 58a, 70a[1]; Bernstein Dep, Apx 103a, 142a).

After extensive negotiations, Kenneth Poss and Randy Bernstein entered into an oral contract, effective August 1, 1991, whereby Bernstein agreed to: rejoin Poss' podiatry practice; operate the practice and protect Poss' financial interests in the practice until Poss' podiatry license was reinstated; and, split all corporate profits equally with Poss (Complaint, ¶¶8, 9, 11, Apx 58a-59a, 70a-71a; Interrog Ans 20, 23, Apx 94a-95a; 12/11/91 Memo, Apx 33a-34a; Bernstein Dep, Apx 102a-103a, 106a).

Pursuant to the agreement, Bernstein would be responsible for the medical aspects of the podiatry practice while Poss would remain responsible for all corporate administration and management (Complaint, ¶¶8, 13, Apx 58a-59a, 70a-71a; Interrog Ans 20, 23, Apx 94a-95a; Bernstein Dep, Apx 103a, 106a). Additionally, Poss and Bernstein agreed that Bernstein would temporarily serve as the sole corporate shareholder and sole corporate officer of Foot Health Center, Inc. ("FHC"), a corporation to be founded in order to continue operation of Poss' established practice (Complaint, ¶¶8, 9, 13, Apx 58a-59a, 70a-71a; Interrog Ans 20, 23, Apx 94a-95a; 12/11/91 Memo, Apx 33a-34a; Bernstein Dep, Apx 106a).

[1] Plaintiff's original Complaint was filed on 4/28/08 and assigned Case No 08-091154-NM (Apx pp 57a-66a). The 4/28/08 Complaint was voluntarily dismissed without prejudice pursuant to stipulation (Apx pp 67a-68a), with Plaintiff's action refiled on 12/4/08 (Apx pp 69a-78a) and assigned the current Case No. 08-096538-NM.

At all times during the negotiation of the oral contract between Poss and Bernstein, Poss was represented by his long-time business attorney, the Defendant Barry Bess, and Bernstein was represented by his own attorneys (Interrog Ans 23, 24, Apx 95a; Bernstein Dep, Apx 102a-106a, 111a, 145a).

On August 8, 1991, Poss formed a separate corporation, Diversified Medical Consultants, Inc. ("DMC") as a vehicle to manage FHC and to receive compensation for these management services (Bernstein Dep, Apx 103a-104a; Articles of Incorp, Apx 13a-16a). Poss served as the sole corporate director, officer and shareholder of DMC (Id).

FHC was incorporated on August 16, 1991 (Complaint, ¶14, Apx 59a, 71a; Articles of Incorp, Apx 17a-21a). FHC's assets were comprised solely of those assets previously belonging to Poss and his "thriving" practice; Bernstein paid no consideration for his shares in FHC (Bernstein Dep, Apx 106a). The Defendants Barry Bess and his firm, Seyburn, Kahn, Ginn, Bess & Serlin, P.C. (hereinafter "Seyburn/Kahn"), served as corporate counsel for FHC (Bernstein Dep, Apx 106a, 145a).

On August 16, 1991, Randy Bernstein, individually, and as president of FHC, and Kenneth Poss, as president of DMC, executed a Management Services Agreement (Agreement, Apx 22a-32a; Bernstein Dep, Apx 105a). This contract conferred the authority to retain and instruct legal counsel for FHC exclusively upon DMC/Kenneth Poss:

> 1. Engagement of Management Services. FHC hereby appoints and engages DMC to provide management, consulting, and other administrative support services for and on its behalf, and DMC agrees to act in such a capacity, subject to and in accordance with the terms and conditions of this Agreement.
>
> 2. Services to be Performed. For and on behalf of FHC, *DMC shall provide and have sole authority and responsibility for all management, marketing, financial, billing and other administrative support services necessary or appropriate for the operation of*

FHC's podiatric practice at all of FHC's locations, which services shall include, without limitation, all of the following:

* * *

(m) *Select FHC's professional advisors for legal* and accounting *services.*"

(Id, Apx 22a-23a, emphasis supplied in italics).

The Management Services Agreement also expressly and irrevocably designates Poss as the attorney-in-fact for Bernstein and FHC for the purposes of dissolution and liquidation of FHC:

7. Terms and Termination.

* * *

(c) Upon termination of this Agreement for any reason, …FHC and Bernstein each hereby *irrevocably designate the president of DMC* [Kenneth Poss] *as their respective attorney-in-fact*, coupled with an interest, to effectuate such dissolution and liquidation….

(Id, Apx 29a-30a, emphasis supplied in italics).

Bernstein has repeatedly acknowledged that he voluntarily executed the Management Services Agreement after receiving the advice of his own legal counsel (Agreement, Apx 31a; Bernstein Dep, Apx 105a-109a).

It is undisputed that DMC, through its authorized employee, Kenneth Poss, controlled all of FHC's corporate management duties – including the selection of and interaction with the Defendants as corporate counsel for FHC (Complaint, ¶¶8, 13, 16, 23, Apx 59a-60a, 71a72a; Interrog Ans 30, 23, Apx 94a-95a; Bernstein Dep, Apx 117a).

In 1992, Poss regained his podiatry license and resumed active practice with FHC (Complaint, ¶21, Apx 60a, 72a; Bernstein Dep, Apx 111a).

As of June 1, 1992, Poss served as the sole member of the board of directors for FHC, as well as serving as the corporate president and secretary (6/1/92 Consent, Apx 35a-38a; 6/24/92

Memo, Apx 39a-40a). Bernstein served as vice president and treasurer (Id). As of June 1, 1992, Poss became a 50 percent shareholder, with Bernstein holding the other 50 percent (Id).

On December 18, 1998, Poss formed Foot & Ankle Health Centers, P.C. ("FAHC"), a corporation which succeeded to the interests of FHC as of January 1, 1999 (Complaint, ¶18, Apx 59a, 71a; Articles of Incorp, Apx 41a-44a; Bernstein Dep, Apx 145a). Poss designated himself as the sole director of FAHC, as well as the corporate president, secretary and treasurer, and designated Bernstein as FAHC's Vice-President (2005 Corp. Update, Apx 53a-54a). At the time of incorporation, Poss designated himself as a 98% shareholder and designated Bernstein as a 2% shareholder in FAHC (Bernstein Dep, Apx 125a).

The incorporation and management of FAHC was directed solely by Poss, including all interactions with the Defendants as corporate counsel (Complaint ¶¶7, 16, 18, 19, Apx 59a-60a71a-72a; Bernstein Dep, Apx 145a).

On January 15, 1999, a Certificate of Assumed Name was filed indicating that FAHC would be doing business as FHC (Complaint, ¶19, Apx 60a, 72a).

On January 22, 1999, FHC changed its name to Sharon Foot Centers, P.C. (1/22/99 Certificate, Apx 45a-48a).

On February 9, 1999, Sharon Foot Centers P.C. filed a Certificate of Amendment to the Articles of Incorporation, the terms of which terminated the corporation's existence effective February 11, 1999 (2/10/99 Certificate, Apx 49a-51a).

On December 29, 2000, Poss provided Bernstein with an incomplete copy of a Consent in Lieu of Joint Annual Shareholders and Directors meeting (Complaint, ¶¶44, 53, 54, 63a-65a, 75a-77a; Bernstein Dep, Apx 137a). By signing this form, Bernstein ratified an allocation of 98% of the shares in FAHC to Poss (Id).

On May 15, 2002, Poss formed Sunset Boulevard, LLC ("Sunset Blvd") (5/15/02 Articles of Organization, Apx 52a). Sunset Blvd purchased the building that served as the main location of the three offices operated by FAHC (Bernstein Dep Apx 120a-121a, 130a). Bernstein admittedly has no evidence proving that he was to have a 50% equity interest in Sunset Blvd and/or that Bess served as corporate counsel for the LLC (Bernstein Dep, Apx 120a, 134a).

Year-end meetings for all three corporate entities were held annually between 1991 and 2004 with Poss, Bernstein, and Bess in attendance and with all corporate/business documents, including stock certificates, tax records, financial statements, by-laws and minutes, present and readily available for review (Bernstein Dep, Apx 118a, 127a-128a). Until 2005, Bernstein never attempted to review any of the corporate documents (Bernstein Dep, Apx 128a-129a, 146a).

By 2004, Bernstein began actively questioning Poss' heavy-handed and secretive control of corporate/business management (Bernstein Dep, Apx 123a-124a). In mid-2005, Poss began actively withholding financial documents and instruments from Bernstein (Bernstein Dep, Apx 123a). By November of 2005, Bernstein believed that "everything" was "amiss" with respect to the ownership, finances, corporate records, and tax returns for FAHC, and Sunset Blvd (Complaint, ¶31, Apx 61a, 73a; Bernstein Dep, Apx 120a). Therefore, Bernstein instructed his personal attorney, Kenneth Gross, to direct a letter to Bess requesting a copy of all corporate records and tax returns (Id).

At the annual meeting held on December 16, 2005, Bernstein confirmed his year-long suspicion that Poss had intentionally structured FAHC in 1998 with Bernstein as a 2% shareholder (Bernstein Dep, Apx 125a, 129a, 131a, 140a).

In April of 2006, Bernstein decided to terminate his professional and business relationships with Poss (Bernstein Dep, Apx 124a). Therefore, on April 28, 2006, and on behalf of FAHC, attorney Bess directed a letter to Bernstein which:

- confirmed that Bernstein's resignation would be effective June 30, 2006;
- reminded Bernstein that he was bound by a two year non-compete clause;
- reminded Bernstein that FAHC's business practices and marketing strategies must remain confidential;
- requested Bernstein not to solicited or recruit any current FAHC employees;
- requested Bernstein not to contact any of FAHC's service providers; and,
- instructed Bernstein that his FAHC shares must be tendered by May 30, 2006, and he would be advised on or before August 1, 2006 regarding the appropriate redemption price for his stock.

(4/28/06 Letter[2], Apx 55a-56a).

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[2] "This letter is a follow-up to our telephone conversation last week wherein you indicated to me that you were resigning your employment from the P.C. effective June 30, 2006. The purpose of this letter is to advise you as to many of the legal obligations under which you are obliged as a result of your employment and ownership position in the P.C.

First there is a restrictive provision in the By-Laws of the P.C. which precludes you from competing with the practice once your employment terminates. Under that restrictive provision you cannot compete or practice within a radius of five miles of any of the P.C.'s offices for a period of two years. Severe consequences flow from violating that provision.

Second, as you know and as I advised you in our telephone conversation, the patients are those of the practice and not of any particular doctor regardless of how or when or under what circumstances they became patients. Thus, under the restrictive provisions under the P.C.'s By-Laws, they cannot be solicited by any doctor. If you were to do so, that virtually amounts to theft and severe consequences flow from that action.

Third, the practices of the office including its method of conducting business, handling and billing patients, record keeping, standard of care and the like are all confidential and are not to be disclosed to anyone under any circumstances. Neither is any employee of the practice to be solicited for employment, whether full or part-time.

In June 2006, Bernstein confirmed his two-year long suspicions that he had no equity interest in Sunset Blvd (Complaint, ¶35, Apx 62a, 74a; Interrog Ans 27, Apx 96a; Bernstein Dep, Apx 131a, 140a).

On April 28, 2008, Bernstein instituted the instant action against the Defendant attorneys via separate theories of legal malpractice (Count I) and breach of a fiduciary duty (Count II) (Apx 57a-66a, 69a-78a). The Complaint specifically alleges that:

- Bernstein retained the Defendants between 1991 and 2006 to serve as corporate counsel for FHC, FAHC, and Sunset Blvd, as well as Bernstein's personal attorneys for estate planning and other services unrelated to the Defendants' role as corporate counsel (Complaint ¶¶14, 26, 49-51, Apx 59a-61a, 65a, 71a-73a, 77a); and,
- due to the attorney-client relationship, Bernstein reposed faith, confidence and trust in the Defendants to use reasonable care and diligence to act on Bernstein's behalf and to protect Bernstein's interests (Complaint ¶¶43, 44, 51, 52, Apx 63a-65a, 75a-77a).

Bernstein claims that, by following Poss' instructions to form FAHC in 1998 and dissolve FHC in 1999, the Defendant corporate attorneys "allowed" Poss to commit fraud and conversion. (Complaint ¶¶18, 19, 20, 25-28, 37, 44, 48, 53, 54, Apx 59a-65a, 72a-77a). Additionally, Bernstein contends that, while acting as corporate counsel on December 29, 2000, the Defendants failed to intervene when Poss provided Bernstein with an incomplete copy of a Consent in Lieu of Joint Annual Shareholders and Directors meeting and, therefore, allowed

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Fourth, the marketing strategy and practices of the P.C. are confidential as well as the business relationships with any and all of its service providers. They are not to be contacted (by you) in anyway, directly or indirectly.

Finally, as a shareholder in the P.C., your stock must be tendered for redemption on or before May 30, 2006. Also, your written resignation as an officer, director and employee shall be tendered on or before May 30, 2006. Because there exists no Buy-Sell Agreement between you and the Corporation the remaining officers and board members after consultation with their advisors will make a determination of the appropriate redemption price for your stock and you will be so advised on or before August 1, 2006."

Bernstein to unwittingly ratify an allocation of 98% of the shares in FAHC to Poss (Complaint, ¶¶44, 53, 54, Apx 63a-65a, 75a-77a; Bernstein Dep, Apx 137a-139a). Moreover, Bernstein alleges that, in 2002, the Defendants improperly allowed Poss to take Bernstein's expected 50% equity interest in Sunset Boulevard, LLC without notice or compensation (Complaint ¶¶35, 44, 53, 54, Apx 62a-65a, 74a-77a).

Bernstein seeks significant economic damages in the form of lost corporate equity interests and lost corporate profits caused by the Defendants' alleged failure to properly and ethically protect Bernstein's interests as a corporate shareholder from the conflicting interests of Poss and/or the corporate entities (Complaint, ¶¶26, 37, 44-45, 54, Apx 60a-65a, 72a-77a).

Bernstein admits that he has no proof that the Defendants:

- either assisted Poss or were complicit in Poss' efforts to deprive Bernstein of any equity interest in Sunset Boulevard., LLC, and to reduce Bernstein's equity interest from 50% to 2% when FAHC succeeded FHC and thus swindle Bernstein out of over $4 million; and,
- profited, at Bernstein's expense, by receiving over $500,000.00 in unearned attorneys' fees.

(Complaint, ¶¶34-37, 44-45, 54, Apx 62a-65a, 74a-77a; Bernstein Dep, Apx 140a-141a, 144a)

Bernstein testified under oath that he elected to sue corporate counsel in order to "get the truth out of Mr. Bess" thus providing Bernstein with "a little bit more ammunition against Dr. Poss" (Bernstein Dep, Apx 144a).

Following discovery, the Defendants moved for Summary Disposition pursuant to *MCR 2.116(C)(7)* on the basis that Plaintiff's claims are barred by the applicable statutes of limitation.

Specifically, the Defendants contended that the 2008 legal malpractice claims were untimely, having not been filed, as required by *MCL 600.5805* and *MCL 600.5838*, within either:

two years of the date of the last specific service in 2002 out of which the claims arose; or, within 6 months of confirmed discovery in 2006 (Mt Trans 10/24/12, pp 1-9, 19-20[3], Apx 150a-158a, 168a-169a). Defendants argued that the breach of fiduciary duty claims were identical to and, therefore, subsumed by the legal malpractice claims and, hence, also untimely (Id). Alternatively, the Defendants maintained that any independently perfected breach of fiduciary duty claims filed in 2008 were still barred by the three year limitation period set forth in *MCL 600.5805(10)* which, pursuant to *MCL 600.5827,* accrued when the alleged wrongs were committed in 1998, 1999, 2000 and 2002 (Id).

The arguments within the Defendants' Motion for Summary Disposition were verified by the allegations within Plaintiff's Complaint as well as relevant and admissible documentary evidence in the form of: Plaintiff's Answers to Interrogatories; 12/11/91 Bess Memorandum; 8/13/91 Articles of Incorporation for FHC; Management Services Agreement; 6/1/92 Consent in Lieu of a Joint Special Shareholders Meeting; 6/24/92 Bess Memorandum; 12/18/98 Articles of Incorporation for FAHC; 5/17/05 FAHC Information Update; Bernstein's Deposition; 8/1/91 Articles of Incorporation for Diversified Medical Consultants; 1/22/99 Certificate of Amendment for Sharon Foot Centers; 2/10/99 Certificate of Amendment for Sharon Foot Centers; and, 5/15/02 Articles of Organization for Sunset Boulevard (Apx 13a-56a, 89a-146a).

With respect to the timeliness of his malpractice claims, Plaintiff Bernstein countered that the two-year accrual period set forth in *§5805(6)* and *§5838(1)* did not expire until April of 2008. According to Plaintiff, he was "continually represented" by the Defendants through April of 2006 when, on behalf of FAHC, the Defendants acknowledged in writing that Bernstein had terminated his shareholder status in FAHC (Mt Trans 10/24/12, pp 9-19, Apx 158a-168a).

[3] The transcript as provided by the Official Court Reporter does not feature page numbers. The Defendants have assigned page numbers beginning with page one on the page where the Court Clerk calls the case for hearing.

Alternatively, Bernstein argued that the accrual period did not commence until June 2006, when Bernstein realized his full financial damage (Id).

With respect to the breach of fiduciary duty claims, Bernstein insisted that the three-year accrual period in *§5827* did not commence until December of 2005 when he confirmed the breaches of fiduciary duties (Id). At the motion hearing, and without any citation to legal authority, Bernstein argued that the six-year limitation period set forth in *MCL 600.5813* applied to the breach of fiduciary duty claims instead of *§5805(10)* (Mt Trans 10/24/12, p 17, Apx 166a).

The Circuit Court issued an Opinion and Order on November 29, 2012 (Apx 2a-4a) granting the Defendants summary relief pursuant to *MCR 2.116(C)(7)* and reasoning as follows:

> There is no dispute that Plaintiff did not file his claims within 6 months of discovery and therefore the discovery rule does not apply in this case. The Court finds that Defendants discontinued serving Plaintiff as to the matters out of which these claims arose no later than May 15, 2002, when Sunset Blvd was formed. Plaintiff has not shown any relationship between the generalized corporate legal services provided after that date and the specific legal services out of which his malpractice claims arose. Assuming, *arguendo* that Plaintiff could show an ongoing attorney/client relationship dealing with the specific legal services, that relationship would have ended in 2005 when he retained another attorney to investigate the specific legal services and he would have had until 2007 to file a lawsuit. Therefore, the Court finds that Plaintiff's legal malpractice claims are barred by the statute of limitations because he failed to file them within 2 years after they accrued.
>
> Plaintiff alleges that in addition to the malpractice there was also a breach of fiduciary duty based on his status as a shareholder. Plaintiff argues that these claims are not subject to the 2-year statute of limitations for malpractice. Defendants assert that for the purposes of the application of the statutes of limitation, Plaintiff's claims of breach of fiduciary duty are subsumed by the identical claims of legal malpractice. Alternatively, Defendants argue that any independently perfected claims of breach of fiduciary duty are barred by the 3-year statute of limitations in MCL 600.5805. This Court agrees with Defendants. The proper test for determining when a claim for breach of fiduciary duty accrues is when the alleged wrong was committed. Plaintiff's claims for breach are clearly untimely having been filed more than 3 years after each breach allegedly occurred.

(11/29/12 Opinion and Order, Apx 3a-4a).

Plaintiff appealed the Circuit Court's Opinion and Order granting summary disposition pursuant to *MCR 2.116(C)(7)*.

On February 20, 2014, the Court of Appeals issued an opinion reversing the entry of summary disposition on the malpractice claims, reasoning that, under a "continuous general representation" extension or exception to the two year accrual period in *MCL 600.5805(6)* and *5838(1)*, Bernstein's claims arising out of discrete legal services provided to corporate clients FHC, FAHC, and Sunset Blvd between 1991 and 2002 did not accrue until April of 2006, when Bernstein terminated his shares in FAHC (Apx 5a-12a).[4]

The Court of Appeals cited *Levy v Martin, 463 Mich 478; 620 NW2d 292 (2001)* and *Nugent v Weed, 183 Mich App 791; 455 NW2d 409 (1990)* as authority for the existence of a "continuous generalized relationship" exception/extension to the statutory accrual date (Apx 9a-10a). The Court concluded that Bernstein continually relied upon the Defendant attorneys through 2006 notwithstanding unrebutted documentary evidence which established that:

- there had never been an attorney-client relationship between the Defendants, as corporate counsel for FHC, FAHC, and Sunset Blvd, and Plaintiff as a corporate shareholder and/or employee; and,
- in November of 2005, Bernstein had such grave and abiding doubts and suspicions regarding his ownership/equity interest in FAHC and Sunset Boulevard, LLC, that he retained his long-time personal attorney, Kenneth Gross, to investigate.

[4] The Court of Appeals did not address the timeliness of Plaintiff's claims under *§5838(2)*, noting that Plaintiff was not relying on the 6-month discovery rule (Apx 8a).

The Court of Appeals also reversed the entry of summary disposition on the fiduciary duty claims, reasoning that, as a matter of law, a breach of fiduciary duty claim is separate and distinct from claims for legal malpractice and that Plaintiff's complaint sufficiently pled the elements of a fiduciary duty claim (Apx 10a-11a). While recognizing that perfected claims of breach of fiduciary duty are controlled by *§5805(10),* the Court of Appeals never analyzed whether the Circuit correctly determined that Plaintiff had failed to file these claims (Id). Instead the Court chastised the Circuit Court for failing to *sua sponte* apply the fraudulent concealment statute to Plaintiff's Complaint and instructed the Circuit Court on remand to allow Plaintiff to save his breach of fiduciary duty claims via proof of fraudulent concealment (Id).

On May 15, 2014, the Defendants filed an Application for Leave, seeking Supreme Court review and reversal of the Court of Appeal's Opinion of February 20, 2014.

On December 12, 2014, the Supreme Court granted the Defendants' Application for Leave, but restricted review "to the issue whether the plaintiff's claim for legal malpractice accrued at the time the defendants discontinued the provisions of generalized legal services to the plaintiff and whether those services were 'the matters out of which the claims for malpractice arose' under MCL 600.5838, *see* Levy v Martin, 463 Mich 478 (2001)."

STATEMENT OF STANDARDS OF APPELLATE REVIEW

The Supreme Court reviews *de novo* a Circuit Court's ruling on a motion for summary disposition pursuant to *MCR 2.116(C)(7). Petipren v Jaskowski, 494 Mich 190, 201; 833 NW2d 247 (2013); Ligons v Crittenton Hosp, 490 Mich 61, 70; 803 NW2d 271 (2011); Boyle v GMC, 468 Mich 226, 229-230; 661 NW2d 557 (2003).*

A court reviewing a motion pursuant to *MCR 2.116(C)(7)* is required to accept as true the factual allegations within the complaint, unless contradicted by affidavits, depositions, admissions and other documentary evidence submitted by the movant. *Petipren, supra; Odom v Wayne Co, 482 Mich 459, 466; 760 NW2d 217 (2008); Boyle, supra; Maiden v Rozwood, 461 Mich 109, 119; 597 NW2d 817 (1999).* Where documentary evidence is submitted in support of a *(C)(7)* motion, it must be considered by the court. *MCR 2.116(G)(5)* [5]*; Kuznar v Raksha, 481 Mich 169, 175; 750 NW2d 121 (2008); Maiden, supra.* If a defendant demonstrates that a cause of action is barred by an applicable statute of limitations, then the burden shifts to the plaintiff to prove that the case falls inside the statutory periods. *McLaughlin v Aetna Life Ins Co, 221 Mich 479, 483; 191 NW 224 (1922); Warren Consolidated Sch v WR Grace & Co, 205 Mich App 580, 584; 518 NW2d 508 (1994), lv den, 448 Mich 870; 530 NW2d 750 (1995).*

A party is entitled to summary disposition pursuant to *MCR 2.116(C)(7)* where the record demonstrates that there is no genuine issue of material fact regarding whether the claims are barred by the statutes of limitations. *Kuznar, supra; Boyle, supra; Gebhardt v O'Rourke, 444 Mich 535, 544; 510 NW2d 900 (1994); Maiden, supra.*

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[5] (5) The affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10). Only the pleadings may be considered when the motion is based on subrule (C)(8) or (9)."

The Supreme Court also conducts a *de novo* review of issues of statutory construction. *Ligons, supra; Lesner v Liquid Disposal, Inc, 466 Mich 95, 101; 643 NW2d 553 (2002); Omne Fin, Inc v Shacks, Inc, 460 Mich 305, 311; 596 NW2d 591 (1999).*

SUMMARY OF ARGUMENTS

This appeal requires judicial construction of *MCL 600.5805(6)* and *MCL 600.5838(1)*, which contain, respectively, two year limitation and accrual periods for professional malpractice claims, other than those sounding in medical malpractice. Specifically, and citing to *Levy v Martin, 463 Mich 478; 620 NW2d 292 (2001),* the Supreme Court directed the parties to brief "the issue of whether the plaintiff's claim for legal malpractice accrued at the time the defendants discontinued the provisions of generalized legal services to the plaintiff and whether those services were 'the matters out of which the claims for malpractice arose'".

Before and after the *Levy* decision, the Michigan Court of Appeals has struggled to consistently construe the statutory language "the matters out of which the claim for malpractice arose" and, in particular, has sent confusing signals regarding the existence and proper application of a "continuous generalized relationship" exception or extension to the statutory two-year accrual period. This is especially true in legal malpractice actions.

This case provides an excellent opportunity for the Supreme Court to definitively rule that *MCL 600.5805(6)* and *MCL 600.5838(1)* require non-medical professional malpractice claims to be filed within two years of the specific professional services out of which the claims arise, with no exception or extension of time permitted based upon allegations or evidence of a continuing generalized relationship between the parties.

Alternatively, the Defendants submit that any "continuous generalized relationship" exception or extension must be strictly limited to cases where the malpractice claims directly arise out of the continuous generalized relationship as opposed to independent, discrete and intermittent professional services having separate dates of last service.

Under either approach, the Supreme Court should reverse the Court of Appeals opinion and remand for reinstatement of the Circuit Court's Order Granting Summary Disposition pursuant to *MCR 2.116(C)(7)* because, as a matter of undisputed fact:

- Plaintiff's malpractice claims arise out of separate, discrete, random, and intermittent professional services provided regarding the formation and allocation of the shares in three distinct corporate entities which Defendants served as corporate counsel;
- the alleged negligent acts and omissions have independent, random, and intermittent dates of last service ranging from 1991 to 2002;
- Plaintiff shareholder/employee never enjoyed an ongoing attorney-client relationship or mutual relationship of trust and dependency with the Defendant corporate counsel and certainly terminated any such alleged relationship in 2005 when Plaintiff retained long-time personal counsel to investigate his actual equity interest in two existing corporations;
- Plaintiff discovered all of his claims as early as 2005 and no later than 2006; and,
- Plaintiff filed his legal malpractice claims in 2008, after both the two year accrual and six month discovery periods had elapsed.

ARGUMENT:

PLAINTIFF'S LEGAL MALPRACTICE CLAIMS ARE BARRED BY THE PERIODS OF LIMITATIONS SET FORTH IN *MCL 600.5805(6)* AND *MCL 600.5838* BECAUSE PLAINTIFF FILED HIS COMPLAINT MORE THAN SIX MONTHS AFTER DISCOVERING THE ALLEGED MALPRACTICE AND MORE THAN TWO YEARS AFTER THE DATES OF THE SPECIFIC AND DISCRETE LEGAL SERVICES BETWEEN 1991 AND 2002 OUT OF WHICH THE CLAIMS ARISE

A. Introduction.

This appeal requires judicial construction of *MCL 600.5805* and *MCL 600.5838*, which contain the limitation periods for professional malpractice claims, other than those sounding in medical malpractice[6], and state in pertinent part:

> Sec. 5805. (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
>
> (6) Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.
>
> ***
>
> Sec. 5838. (1) Except as otherwise provided in section 5838a or 5838b, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession **accrues** at the time that person **discontinues serving** the plaintiff in a professional or pseudoprofessional capacity **as to the matters out of which the claim for malpractice arose,** regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.
>
> (2) Except as otherwise provided in section 5838a or 5838b, an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The plaintiff has the burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim. A malpractice action that is not commenced within the time prescribed by this subsection **is barred**. Except as otherwise provided in section 5838(a), an action involving a claim based on malpractice may be commenced at any time within the

[6] Since 1986, the timeliness of medical malpractice claims is governed by *MCL 600.5805(6)* and *600.5838a*.

> applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim shall be on the plaintiff. A malpractice action which is not commenced within the time prescribed by this subsection **is barred**.

(emphasis supplied)

Specifically, the Supreme Court is examining whether the Court of Appeals correctly: determined there is a "continuous generalized relationship" exception to or extension upon the two year accrual period set forth in *§5805(6)* and *5838(1)*; and, concluded that Plaintiff's legal malpractice claims were timely filed.

The Defendants submit that the Court should definitively hold that Michigan law does **not** recognize a "continuous generalized relationship exception/extension" to the two-year accrual period set forth in *§§5805(6)* and *5838(1)*. This ruling would necessitate either clarification or repudiation of the Court's prior opinions in *Levy, supra,* and *Morgan v Taylor, 434 Mich 180, 451 NW2d 852 (1990).*

Alternatively, Defendants contend that Plaintiff Bernstein failed to meet the burden of proving that his claims were timely filed under a "continuous generalized relationship" exception/extension to *§§5805(6)* and *5838(1)*.

B. Michigan law does not and should not recognize a "continuous generalized relationship" exception/extension to the two year accrual period set forth in *MCL 600.5805(6)* and *MCL 600.5838(1)*, an accrual period which is expressly premised upon the date of last professional service out of which the malpractice claims arise.

Prior to 1961, the Michigan statutes did not define the accrual period for malpractice actions, and the common law followed a "last treatment or service" rule. See: *Levy, 463 Mich at 478, Morgan, 434 Mich at 187-188.*

The "last treatment rule" was first adopted for medical malpractice actions in *DeHaan v Winter, 258 Mich 293, 296-297; 241 NW 923 (1932).* The *DeHaan* case involved a suit alleging that a doctor negligently treated a broken leg. *Id.* at *295-296.* The Supreme Court held that "[u]ntil treatment of the fracture ceased the relation of the patient and physician continued and the statute of limitations did not run", reasoning that "[d]uring the course of treatment plaintiff was not put to inquiry relative to the treatment accorded him." *Id at 296-297.* The record in *DeHaan* established that, after the fracture had been initially set, the plaintiff patient had regularly visited the defendant physician complaining of pain, was given pain medication, and was assured that the leg would heal in time. *Id.* The plaintiff filed malpractice claims within eight months after the last office visit regarding the leg fracture. *Id.*

In 1961, the Michigan Legislature codified a "last treatment or service" rule for all malpractice actions by enacting the original version of *MCL 600.5838. 1961 PA 236.* See also: *Morgan, 434 Mich at 187-189.* The Committee Comments for *1961 PA 236* state that *§5838* "is based on the rule stated and followed in the Michigan case of *DeHaan v Winter, 258 Mich 293*".

In *Gebhardt, supra,* the Supreme Court determined that *§§5805* and *5838* were "unambiguous" and, adhering to the "statutory scheme as clearly written and intended by the Legislature", held that "[a] client has up to two years from the time his attorney stops representing him regarding the matter in question to bring a malpractice suit." *Id, 444 Mich at 541-544.*

Seven years later, in *Morgan,* the Supreme Court "explored the contours" of the statutory "last treatment or service" rule. *Id, 434 Mich at 188-189.* The plaintiff alleged that the defendant optometrist committed malpractice by failing to timely diagnose glaucoma and refer plaintiff for specialized treatment. *Id at 183.* Between 1981 and 1983, the optometrist performed annual

exams, including glaucoma testing on plaintiff, the glaucoma tests were positive beginning in 1981, but the doctor did not refer plaintiff for specialized treatment until 1983. *Id at 182-183.* The *Morgan* Court held that malpractice claims accrued in 1983 when the optometrist performed the last routine exam and informed plaintiff of the presence of glaucoma, hence, terminating the "air of truthfulness and trust" between the parties. *Id at 193-194.* The Court's conclusion was premised upon the rationale behind the "last treatment rule" which recognizes that, while treatment continues, a patient necessarily relies upon his doctor and, therefore, should not be duty bound to inquire as to the reasonableness or effectiveness of the doctor's decisions. *Id, at 187-188, 193-194.*

However, the *Morgan* Court explicitly cautioned that its holding was limited to the "unique" facts presented, to wit:

- "glaucoma is an insidious disease which often manifests no symptoms to alert the victim";
- a patient is usually totally dependent upon a health professional to diagnose glaucoma;
- the doctor's assurances of good eye health in 1981 and 1983, which induced the plaintiff not to seek further treatment and which otherwise negated any duty of inquiry upon the plaintiff; and,
- a union contract required plaintiff to treat with the defendant unless referral was made to a specialist treatment and, therefore, had prevented plaintiff from seeking treatment elsewhere.

Id. [7]

[7] "When an optometrist performs an eye examination which includes a glaucoma test, it may not be a "treatment," but it is a "service" that is critically important to the patient. As plaintiff points out, glaucoma is an

In *Levy,* the Supreme Court again focused upon the proper application of the "last treatment or service rule', this time in the context of accountant malpractice claims. The defendant accountants provided plaintiff Levy with routine annual tax services from 1974 until 1996, when an IRS audit imposed additional taxes and penalties for 1991 and 1992. *Id at 480-481.* The *Levy* majority determined that the malpractice claims accrued in 1996 reasoning:

- there had been a continuing generalized professional relationship between the parties with regards to the preparation of tax returns;
- until 1996, the plaintiff had no reason to inquire into the correctness of the 1991 and 1992 returns; and,

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insidious disease which often manifests no symptoms to alert the victim. The patient who is told to come in for an eye examination every few years is completely dependent upon the professional to screen for glaucoma and to detect it.

In the instant case defendant argues that the rationale underlying the last treatment rule does not apply in the context of routine, periodic examinations. It is contended that there is no air of truthfulness and trust once the examination is concluded. We disagree. It is the doctor's assurance upon completion of the periodic examination that the patient is in good health which induces the patient to take no further action other than scheduling the next periodic examination.

Particularly in light of the contractual arrangement which bound defendant and entitled plaintiff to periodic eye examinations, it cannot be said that the relationship between plaintiff and defendant terminated after each visit. The obligation and responsibility of defendant to provide glaucoma testing extended beyond the 1981 examination of plaintiff's eyes. We conclude that defendant did not discontinue "treating or otherwise serving" plaintiff "as to the matters out of which the claim for malpractice arose" until August 18, 1983. Thus, we hold that the claim of plaintiff is not barred by the statute of limitations. (footnote omitted).

Since the facts here are unique, and the Legislature has now repealed the last treatment rule as it applied to medical malpractice, we limit our holding to the facts of this case." (emphasis supplied in underline)

- plaintiff alleged that the consecutive returns were inter-related and the defendants failed to offer any evidence that the preparation of each form constituted a separate and discrete professional service.[8]

Id at 486-489.

The *Levy* Court cited *Morgan* as authority for its broad reading of the statutory language "the matters out of which the claim for malpractice arose", reasoning that, unlike the plaintiff in *DeHaan* who had been receiving treatment for a specific ailment, the plaintiff in Morgan and plaintiff Levy were pursuing claims premised upon routine and periodic professional services. *Id. at 488-489.*

Like the *Morgan* Court, the *Levy* majority also explicitly constrained its holding to facts before it, taking pains to accentuate that:

- the two year limitation period for malpractice claims should never be extended merely because a professional provided generalized services over a period of time in addition to specific and discrete services out of which the malpractice claims arise[9].
- the "continuous services" or "continuous relationship" only applies where the malpractice claims arise out of repeated, routine and generalized professional services; and,
- the defendants failed to submit any evidence regarding the nature of the professional services at issue.

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[8] "We note that the result may have been different if defendants had come forward with documentary evidence that each annual income tax preparation was a discrete transaction that was in no way interrelated with other transactions."

[9] "Accordingly, this opinion does not mean, for example, that if an accountant prepared income tax returns for a party annually over a period of decades, the statute of limitations for alleged negligence in preparing the first of these tax returns would not run until the overall professional relationship ended." (emphasis supplied in underline)

Id at 489.[10]

Judge Markman dissented from the *Levy* majority's reasoning and conclusions, taking the position that the plain language of *MCL 600.5805* and *5838* does not allow for the creation of a broad "continuing generalized relationship exception or extension" and the facts of the case would not accommodate application of such an exception/extension:

> I respectfully disagree with and dissent from the majority's conclusion that the 'last treatment' rule served to keep plaintiff's professional malpractice action viable in this case. (footnote omitted) Rather, I believe that the Court of Appeals correctly affirmed the trial court's grant of summary disposition in defendants' favor.
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> From the very limited record in this case, it appears that defendants were hired by plaintiffs to act as their personal and corporate accountants. Defendants prepared plaintiffs' annual tax returns for the years 1974 through 1996, a period of twenty-two years. Plaintiffs' 1991 and 1992 tax returns were audited by the Internal Revenue Service (IRS) in 1994, with the IRS presenting plaintiffs with a notice of deficiency in December 1995. Plaintiffs subsequently filed a two-count complaint against defendants in August 1997, alleging professional negligence and fraud.
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> The essential question in this case is: When did plaintiffs' claim of professional malpractice accrue for purposes of applying the pertinent limitation period?
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> ***

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[10] "...it is clear here that plaintiffs, rather than receiving professional advice for a specific problem, were receiving generalized tax preparation services from defendants. These continuing services, just like the continuous eye examinations in *Morgan*, to be consistent with the *Morgan* approach, must be held to constitute 'the matters out of which the claim for malpractice arose.' [19]

> 19 We note that we are reviewing this case in the context of a motion for summary disposition brought by defendants under *MCR 2.116(C)(7)* based on the statute of limitations. In bringing such a motion, a defendant may, but is not required to, submit documentary evidence in support of its assertion that a claim is barred by the statute of limitations. See *Patterson v Kleiman, 447 Mich 429, 432; 526 NW2d 879 (1994)*.
>
> However, in the present case, defendants have not offered documentary evidence regarding the nature of the professional services that were provided by defendants to plaintiffs. As Judge WHITBECK stated below, in the absence of any documentary evidence on a point, in reviewing a summary disposition motion under *MCR 2.116(C)(7)* we must accept the well-pleaded allegations in a complaint as true. Plaintiffs alleged that defendants prepared their income tax returns from 1974 to 1996. Defendants have failed to present any evidence that this is untrue--or that each income tax preparation was a discrete transaction that should be considered to separately constitute "the matters out of which the claim for malpractice arose," *MCL 600.5838(1)*; MSA 27A.5838(1), for purposes of the last treatment rule. Accordingly, we conclude that defendants have not established that plaintiffs' claims are barred by the statute of limitations."

In the present case, the majority relies on the Court of Appeals dissent, which in turn relied on this Court's analysis in *Morgan, supra.* Respectfully, I disagree with the dissent's assertion that 'the touchstone' of the 'last treatment' rule is the "*continuing professional relationship* between a professional and the person receiving the professional's services. . . .' Unpublished opinion per curiam, issued September 17, 1999 (Docket No. 207797) (WHITBECK, J., concurring in part and dissenting in part), slip op at 4 (emphasis in the original).

The plain language of subsection 5838(1) does *not* state that a claim of professional malpractice accrues on the last date of service (i.e., 'last date of treatment'), period. Rather, the statutory language clearly defines the point of accrual, confining the last date of service expressly to those matters '*out of which the claim for malpractice arose*'; from this language, certainly, a professional relationship may continue on *even though* a malpractice claim arising out of that relationship has accrued and the clock has started to run with regard to the two-year limitation period. The Court of Appeals dissent and the majority's adoption of the dissent's analysis without explanation fail to acknowledge and give effect to the plain language of the *entire* sentence comprising subsection 5838(1), thereby rendering the modifying phrase 'matters out of which the claim for malpractice arose' superfluous.

The majority asserts that, in enacting § 5838, the Legislature 'extended' or 'expanded' upon the common-law "last treatment" rule set forth in *De Haan.* See slip op at 10. However, in my judgment, the legislative comment that § 5838 "is based on the rule stated and followed in the Michigan case of *De Haan*" effectively militates *against* the majority's assertion. The facts in *De Haan* involved a distinct period of medical treatment, relating to a distinct medical condition, with this Court concluding that a claim of professional malpractice, arising 'during the course of [that] treatment,' would not be barred by the limitation period as long as that *particular* course of treatment, for that *particular* medical condition, continued. *Id.* at 297. Specifically, *De Haan* did not determine that once the treatment of the plaintiff's fracture ceased, his claim of professional malpractice, arising out of the treatment for the fracture, remained viable as long as a physician-patient relation continued.

The phrase 'as to the matters out of which the claim for malpractice arose,' found in subsection 5838(1), clearly equates with the phrases 'until treatment of the fracture ceased' and 'during the course of treatment' found in *De Haan. 258 Mich. at 296, 297.* Moreover, *Morgan* refers to the *De Haan* language 'while . . . treatment continues' in attempting to explain the rationale for the 'last treatment' rule. *434 Mich. at 187.* Importantly, this Court, in determining that the facts of *Morgan* were 'unique,' *limited* its holding to the facts of that case. *Id. at 194.* Thus, I can discern no logical force to the suggestion that the Legislature intended to broaden the common-law 'last treatment' rule, as stated and applied in *De Haan,* when it drafted the language of § 5838.

Further, the facts in the present case, although very sparse for purposes of appellate review, are nevertheless quite distinguishable from the facts found in *Morgan, supra.* In *Morgan,* there was a requirement under an employer/union contract that the plaintiff be given an opportunity to have his eyes examined and reevaluated every two years. (footnote omitted) Granted, there may have been changes that occurred in the plaintiff's eyes between visits, but it would be necessary to address these changes in the context of the condition of the plaintiff's

same eyes, determined at the last visit and every visit before that. There was certainly an interrelation, even interdependency, between one eye examination and the next because the *same* eyes were being examined each time.

However, plaintiffs' annual tax returns in the present case cannot be considered analogous to the plaintiff's eyes in *Morgan.* The preparation of annual tax returns involves the compilation and computation of a distinct and discrete body of information, generally not the same from year to year. In other words, in each successive year, a client is not bringing to his accountant the same aggregation of receipts to be reevaluated and reexamined, to discern if some change has taken place in that particular body of information and data. Rather, the client generally brings in a new aggregation of receipts specific and distinct to the year for which the tax return is being completed. An accountant is generally not "caring for" the client's same tax return from year to year, as a physician cares for the same set of eyes, or the same liver, kidneys, or heart, from examination to examination. Thus, in the present case, *each successive* annual tax return represented "the matters out of which the claim for malpractice arose," a phrase to which the Court of Appeals dissent and the majority here give little apparent effect.

Further, I do not share the Court of Appeals dissent's concern that 'with regard to business income taxation, certain matters such as depreciation of business assets and eligibility for certain tax credits often depend on facts that extend further into the past than the prior tax year.' Slip op at 5, n 3. While such an assertion may or may not be accurate, the important factor is that the body of information and data used *each successive year* to compile, compute, and prepare an income tax return is not the same; it is not analogous to the same set of eyes or the same liver or the same heart that is examined and evaluated by a physician at each office visit. The fact that there may be some common information that is used in preparing an annual income tax return does not change the fact that it is used in conjunction with an entirely different and distinct amalgam of information and data collected specifically for each year for which the tax return is being prepared, an amalgam representing the 'matters out of which the claim for malpractice [may arise]' for purposes of establishing the claim's accrual date. Subsection 5838(1). (footnote omitted)

In the present case, the 'matters out of which [plaintiffs'] claim for malpractice arose' involved defendants' preparation of their 1991 and 1992 income tax returns. Thus, under the plain language of subsection 5838(1), plaintiffs' claim of professional malpractice accrued, and the two-year limitation period began to run, when defendants worked their last day with regard to these distinct returns. Even assuming that defendants worked on plaintiffs' 1992 tax return through December 1993, plaintiffs' cause of action for malpractice was barred by subsection 5805(4) on the last day of December 1995. Plaintiffs' complaint was not filed until August 1997. (footnote omitted)

The Court of Appeals dissent's analysis and the majority's reliance on this analysis, effectively erode the policy bases for having statutory limitation periods in the first place. Obviously, while one policy base is to afford plaintiffs a reasonable opportunity to bring suit, statutes of limitation are also intended to: (1) compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend; (2) relieve a court

system from dealing with stale claims, where the facts in dispute occurred so long ago that evidence was either forgotten or manufactured; and (3) protect potential defendants from protracted fear of litigation. *Chase v Sabin, 445 Mich. 190, 199; 516 N.W.2d 60 (1994).*

Asserting, as the Court of Appeals dissent does in the present case, that the termination of the professional relationship is the beginning and end of the analysis in determining when a professional malpractice claim has accrued, tolls the limitation period in a potentially large number of professional malpractice cases, pending the ultimate and final termination of the professional relationship. Under the majority's interpretation of subsection 5838(1), a professional relationship may exist for one hundred years; if, perchance, malpractice was committed in the very first year of the relationship, a claim could potentially remain viable for another 101 years. Certainly, a reasonable time would have long since passed, thereby undermining the opposing party's ability to defend such a stale claim, extending the potential defendant's apprehension of litigation to unreasonable and unacceptable lengths, and unnecessarily burdening the judicial system with claims so stale as to be virtually untriable. See *Chase, supra.*

In enacting § 5838, it is reasonable to conclude that the Legislature addressed the conflict between the accrual of a simple tort claim, which generally involves but a single act or omission, and the accrual of a professional malpractice claim, where actual malpractice may occur within an extended, but nevertheless distinct, period of continuing professional service. (footnote omitted)

The 'matters out of which [plaintiffs'] claim for malpractice arose' involved defendants' preparation of plaintiffs' 1991 and 1992 income tax returns. Pursuant to the plain language of subsection 5838(1), the last date on which defendants worked in preparing such returns was the date on which plaintiffs' claim for professional malpractice accrued for purposes of the running of the statute of limitations. Because plaintiffs failed to file their complaint until well after the applicable two-year limitation period had run, their claim for professional malpractice, in my judgment, was time- barred and the circuit court properly granted summary disposition in favor of defendants in this case.

Id, 463 Mich at 491-503, emphasis in italics in original, supplied in underline.

Before and after the *Morgan* and *Levy* decisions, the Michigan Court of Appeals has struggled to consistently construe the statutory language "the matters out of which the claim for malpractice arose" and, in particular, has sent mixed messages regarding the existence and proper application of a "continuous generalized relationship" exception or extension to the statutory two year accrual period. This is especially true for legal malpractice actions.

Most Court of Appeals panels have held that legal malpractice actions accrue upon completion of the specific legal service being challenged as negligent, regardless of general follow-up or administrative activities **and** notwithstanding the fact that general or specific legal services were provided on other matters. *Cummings v Cohen Law Office, 2014 Mich App LEXIS 1091* (No 314753, 6/12/14) **[Ex 1]**; *Anderson v Wierenga, 2012 Mich App LEXIS 635 (No. 301946, 4/10/12), lv den, 492 Mich 869; 819 NW2d 868 (2012)* **[Ex 2]**; *Traynor v McMillen, 2010 Mich App LEXIS 1504 (No 289284, 8/5/10)* **[Ex 3]**; *Masterguard Home Security v Nemes and Anderson, PC, 2010 Mich App LEXIS 1481 (No 291085, 7/29/10)* **[Ex4]**[11]; *Boss v Loomis, Ewert, et al, 2010 Mich App LEXIS 504 (No's 287578 & 289438, 3/16/10), lv den, 487 Mich 857; 784 NW2d 813 (2010)***[Ex 5]**[12]; *Charfoos v Schultz, 2009 Mich App LEXIS 2313 (No 283155, 11/5/09)***[Ex 6]**[13]; *Wright v Rinaldo's, 279 Mich App 526, 534-535; 761 NW2d 1114 (2008); Gould v Huck, 2008 Mich App LEXIS 1879 (No 279538, 9/9/09)* **[Ex 7]**; *Mamou v Cutlip, 2008 Mich App LEXIS 1202 (No 275862, 6/10/08), lv den, 483 Mich 912; 762 NW2d 505 (2009), reh den (6/23/09)* **[Ex 8]**[14]; *Kloian v Schwartz, 272 Mich App 232, 238; 725 NW2d 671*

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[11] The *Masterguard Home Security* Court concluded that, where malpractice claims arise out of representation in one matter, it is legally irrelevant that attorneys were later retained to provide services in a subsequent and separate, **albeit related**, matter.

[12] The *Boss* Court refused to apply the "last service rule" as applied in *Levy* on the basis that the defendants' provided legal services for "separate" and "disparate" business and personal matters as opposed to the **same** routine and periodic services.

[13] The *Charfoos* Court recognizing that the "continuous representation rule" may be contrary to the express language in *MCL 600.5838,* especially in cases not involving ongoing representation during litigation, and finding that the plaintiff's claims arose out of only one of a series of discrete estate planning services.

[14] The *Mamou* Court held that the defendants' representation of plaintiff in various business, estate planning, and litigation matters did not create "continuing services" that would defeat dismissal of malpractice claims filed nine years after preparation of release out of which the malpractice claims arose.

(2006), lv den, 477 Mich 1124; 730 NW2d 244 (2007)[15]; *Alken-Ziegler, Inc v George, Bearup & Smith, 2006 Mich App LEXIS 615 (No 264513, 3/9/06)*[**Ex 9**][16]; *Balcom v Zambon, 254 Mich App 470, 484; 658 NW2d 156 (2002); Estate of Mitchell v Dougherty, 249 Mich App 668, 684; 644 NW2d 391 (2002); Dettlopp v Dold, Spath, et al, 1998 Mich App 2585 (No 199426, 3/20/98)* **[Ex 10]**[17].

Chapman v Sullivan, 161 Mich App 558; 411 NW2d 754 (1987) is the earliest and most frequently cited decision advocating for a narrow construction and application of *§5838(1)*. In that case, the Court of Appeals rejected arguments that an attorney continues to represent a client until the client formally discharges the attorney or until the client realizes the damages caused by the malpractice. *Id, 161 Mich App at 560-564.* The *Chapman* Court recognized that, for the purposes of the two year statutory accrual period, a distinction must be made between situations where the legal malpractice claims arise out of specific transactions as opposed to ongoing litigation. *Id, 161 Mich App at 561.* The Court explained that, while litigation attorneys can be relieved of ongoing representation only by formal client discharge or Court order, a transactional attorney's representation terminates upon completion of the specific legal service he/she was retained to perform. *Id.* The Court reasoned that its focus upon the specific legal service at issue was mandated by the language of *§5838(1)* which explicitly premised accrual upon the date of

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[15] "We again recognize that a plaintiff's legal malpractice claims accrues on the day that the attorney last provides professional service in the specific matter out of which the malpractice claim arose", citing *Gebhardt, 444 Mich at 543.*

[16] The *Alken-Ziegler* Court held that: documentary evidence established that the defendants' representation in matter out of which malpractice claim arose ended more than two years before complaint was filed; plaintiffs failed to rebut this evidence; and, it was legally irrelevant that the defendants subsequently represented plaintiffs on other matters.

[17] The *Dettlopp* Court held that claims arising out of preparation of release accrued on date the release was prepared, not on a later date when the release was executed.

last service out of which the malpractice claims arose. *Id, 161 Mich App at 563.* Similarly, the *Chapman* Court readily rejected extending the two year accrual period until the date damages are discovered, reasoning that the Legislature had expressly rejected any such connection between accrual and discovery. *Id.* Here the Court highlighted that the Legislature had moderated the harshness of a two year accrual date pegged to last service, by allowing malpractice claims to be filed after expiration of the two year period, so long as filing occurred within six months of discovery. *Id. 161 Mich App at 563-564.*[18]

Unfortunately, other Court of Appeals' panels, including the panel below, have concluded that, whenever a defendant even allegedly provides "continuous" and "generalized" professional services over a period of time, the two-year limitation period does not accrue until the overall professional relationship ends. *RLVIC, Inc v Dawda, Mann, et al, 2006 Mich App LEXIS 605 (No 265167, 3/7/06)* **[Ex 12]**[19]; *Azzar v Tolley, 2004 Mich App LEXIS 2979, *8-12 (No 249879, 11/2/04), lv den, 474 Mich 922; 705 NW2d 349 (2005)* **[Ex 13]**[20]; *Maddox v*

[18] While it addresses the timeliness of accounting as opposed to legal malpractice claims, it is worth noting the Court of Appeals decision in *Old CF, Inc v Rehmann Group, LLC, 2012 Mich App LEXIS 1836, *7-15 (No 307484, 9/20/12), lv den, 493 Mich 930; 825 NW2d 77 (2013)* **[Ex 11]**. In that case, the panel determined that Supreme Court's decisions in *Levy* and *Morgan* foreclosed application of any "continuous relationship" extension to the "last treatment rule" to situations where there is evidence that the professional provided discrete transactions with definitive completion dates.

[19] "The 'last treatment rule' as codified in *MCL 600.5838(1)* provides that the two-year statute of limitations governing legal malpractice claims does not begin to run when the professional has ceased to provide services with regard to a single matter, rather, the statute of limitations begins to run only when the professional has ceased providing services as to the broad 'matters' out of which the claim arises."

[20] "The last treatment rule has been expanded to apply to routine, periodic professional services unless there is an occurrence between services that terminates the trust of the original relationship."

Burlingame, 205 Mich App 446, 450-451; 517 NW2d 816 (1994), lv den, 448 Mich 867; 528 NW2d 735 (1995)[21]; *Nugent v Weed, 183 Mich App 791, 796; 455 NW2d 409 (1990)*[22].

Regrettably, several federal courts have also concluded that Michigan follows a "broad view" regarding the accrual of malpractice claims, with judicial focus upon the "whole relationship" rather than the specific acts and omissions out of which the claims arise. *Kutlenios v Unum Provident Corp, 475 Fed Appx 550, 554; 2012 US App LEXIS 7009, *7-9 (6th Cir, 4/6/12); Shapiro v French, 2010 U.S. Dist. LEXIS 123368 (ED MI, 11/22/10)*[23]; *Gold v Deloitte & Touche, 405 BR 830, 839-845 (Bank Crt, ED Mich, 10/16/08); Ameriwood Indus Int'l Corp v Arthur Anderson & Co, 961 F Supp 1078, 1092-1094 (WD Mich, 3/11/97)*[24].

Notably, Judge Markman dissented from the Supreme Court's Order denying leave in *Azzar v Tolley,* again taking the position that plain language of *MCL 600.5805* and *5838* does not allow for the creation of a broad "continuing generalized relationship" exception or extension:

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[21] The *Maddox* Court held that 1990 legal malpractice claims did not accrue in 1986 when defendant lawyers completed sale of business because defendants engaged in "continuing representation" by communicating with and billed the plaintiffs in 1988 with respect to problems arising out of the purchase agreement.

[22] In *Nugent* the plaintiff musician directly retained the defendant Weed in 1971 to represent him and his corporations in various legal and investment affairs; Weed provided legal services in an individual capacity before incorporating his law practice in 1977; Weed and the PC constantly represented Nugent and his corporations until 1984, when Nugent terminated the relationship on the basis that the defendants had continuously provided improper financial advice; and, Nugent's complaint was filed in 1986. *183 Mich App at 792-793.* The Circuit Court determined that the malpractice claims against Weed were time-barred because the attorney had ceased providing professional services in an individual capacity in 1977. *Id at 794.* The Court of Appeals reversed on the basis that: as a matter of law, the individual attorney remained personally liable for malpractice committed by the PC; the individual attorney, both as a solo practitioner and as the sole shareholder in his PC, continuously represented Nugent and his corporations as to the specific matters out of which the malpractice claims arose; and, the only change in the parties' relationship was the legal form of the defendant attorney's practice, a fact that was irrelevant to the application of *§5838(1). Id at 795-796.*

[23] The *Shapiro* Court concluded that, under required broad reading of the Michigan malpractice accrual statute, "potential malpractice claims against (the defendant) law firm did not accrue until … the firm ceased to serve (plaintiff) in a variety of matters."

[24] "…where the parties have a longstanding relationship with respect to multiple interrelated matters, the statute of limitations generally has been held to run from the last date of service on all the matters."

> Defendant served as general counsel to plaintiff's various companies for many years, assisting with business and personnel matters, and other nonlegal matters. In 1994, defendant proposed the purchase of a 225-acre parcel of land for $312,000. The plan was that defendant would retain 80 acres as the site of his new home, and the other 145 acres would be developed. Plaintiff loaned defendant $98,000, and the deal was commenced. The deal was not otherwise documented. In 1997, defendant conveyed the entire parcel, including defendant's house now built on the land, to his wife in a divorce settlement. Defendant only repaid $11,000 of the loan to plaintiff, and in 1999, plaintiff discharged defendant.
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> In 2001, plaintiff sued defendant under theories of breach of contract, promissory estoppel, unjust enrichment, and legal malpractice. The trial court granted summary disposition to plaintiff on all the claims except the legal malpractice claim, on which the court granted summary disposition to defendant.
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> The Court of Appeals reversed the dismissal of the malpractice claim, concluding that the statutory period of limitations had not begun to run until the longstanding relationship between attorney and client ceased. Therefore, the malpractice claim, which was filed within two years of the termination of the relationship, was timely.
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> However, *MCL 600.5838(1)* provides:
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> > [A] claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudo-professional capacity *as to* the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. [Emphasis added.]
>
> Therefore, contrary to the Court of Appeals determination, the limitations period began to run, not when defendant discontinued serving plaintiff as to *any* matter, but only when defendant discontinued serving plaintiff "as to" the matters out of which the claim for malpractice arose. Although defendant continued to perform various legal and nonlegal tasks for plaintiff until 1999, the loan transaction/land purchase was the 'matter out of which the claim for malpractice arose . . . .' Therefore, the two-year limitations period began to run, at the latest, in 1997, when the property was conveyed to defendant's wife. Because plaintiff did not file a complaint until 2001, his malpractice claim is time-barred. Therefore, I would reverse the judgment of the Court of Appeals and reinstate the trial court's order granting summary disposition to defendant.

474 Mich at 922-923.

The Defendants share Justice Markman's view that the correct construction and application of *MCL 600.5805(6)* and *MCL 600.5838(1)* demands repudiation of any actual or perceived "continuous generalized relationship" exception to or extension upon the two-

year accrual period the Michigan Legislature imposed upon professional malpractice claims.

First, this Court faithfully adheres to the principle that unambiguous statutory language must be enforced, as written, without judicial addition, subtraction, or modification. *Ligons, 490 Mich at 70; Lesner, 466 at 101* ["We may not read anything into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself."]; *Omne Fin, 460 Mich at 311.* Scrupulous judicial deference is accorded to statutory amendments which, by their very nature, manifest a legislative intent to effect change. *Huron Twp v City Disposal System, 448 Mich 362, 366; 531 NW2d 153 (1995); Sam v Balardo, 411 Mich 405, 430; 308 NW2d 142 (1981); Bonifas-Gorman Lumber Co v Unemployment Comp Comm, 313 Mich 363, 369; 21 NW2d 163 (1946).*

When enacting *MCL 600.5838,* the Michigan Legislature explicitly adopted the "last treatment rule" as originally articulated in *DeHaan,* without exception, modification, or reservation. Committee Notes to *1961 PA 236.* Critically, the *DeHaan* Court held that malpractice claims accrue on the date of last specific professional act or omission at the heart of the tort claims - not on the date the overall professional relationship terminated. *Id, 258 Mich at 296-297.* The *DeHaan* Court reasoned that a client should not be duty-bound to question reliance upon a professional's judgment relative to specific services being rendered – the Court did not state that accrual should be delayed until the entire professional relationship is terminated by the client or otherwise *Id.* The Michigan Legislature revealed its intent to likewise measure accrual from the date of last specific professional act or omission by deliberately utilizing the words "discontinues serving the plaintiff in a professional… capacity as to the matters out of which the claim for malpractice arose".

The Legislature could have – but did not – peg accrual at the time the professional relationship ceased in its entirety. The Legislature could have – but did not – distinguish between short and long term and intermittent or continuous professional relationships. The Legislature could have – but did not – enact a special tolling statute designed to stay the accrual of professional malpractice claims until the termination of any and all professional services.

Indeed, by treating professional malpractice claims differently from other ordinary tort claims in *§5805*[25] and then enacting *§5838* further and specifically qualifying the general accrual period in *§5805,* the Legislature must be deemed with the common-sense awareness that, unlike other relationships, professional relationships often involve ongoing services regarding a variety of discrete matters. *Marquis v Hartford Accident & Indem (On Rem), 444 Mich 638, 644; 513 NW2d 799 (1994); Hwy Comm'r v Goodman, 349 Mich 311, 322; 84 NW2d 507 (1957).* See also: *Gebhardt, 444 Mich at 543* [*§5838* defines accrual in specific terms and, hence, controls over any general notions of accrual]; *Levy (Markman dissenting), 463 Mich at 502*[26]. As Judge Markman astutely noted, the Legislature obviously recognized that "a professional relationship may continue on *even though* a malpractice claim arising out of that relationship has accrued and the clock has started to run with regards to the two year limitation period." *Levy (Markman dissenting), Id* at *496* (emphasis in original).

Simply put, the principles of statutory construction decree strict judicial enforcement of the words "as to the matters out of which the claim for malpractice arose" as written and clearly intended by Legislature; to wit: a client has up to two years from cessation of the specific

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[25] Copy of *MCL 600.5805* attached as **Ex 14**.

[26] "In enacting §5838, it is reasonable to conclude that the Legislature addressed the conflict between the accrual of a simple tort claim, which involves but a single act or omission, and the accrual of a professional malpractice claim where actual malpractice may occur within an extended, but nevertheless distinct, period of continuing professional service."

professional services to bring malpractice claims premised upon such services. *Ligons, supra; Lesner, supra; Omne Fin, 460 Mich at 311; Huron Twp v City Disposal System, supra; Marquis, supra; Sam, supra; Bonifas-Gorman Lumber Co, supra..* See also: *Gebhardt, 444 Mich at 544; Levy (Markman dissenting), 463 Mich at 496-497; Azzar (Markman dissenting), 474 Mich at 922-923; Kloian, supra; Chapman, supra.*

The public policy underlying statutes of limitation also compels rejection of the notion that the Michigan Legislature intended that a continuing professional relationship permits judicial expansion of the two-year accrual date beyond the last date of the specific negligent acts or omissions at issue. Statutes of limitation represent "a legislative determination of that reasonable period of time that a plaintiff will be given in which to file an action." *Lothian v City of Det, 414 Mich 160, 165; 324 NW2d 9 (1982).* Such statutes also reconcile the conflict between competing interests; namely: affording plaintiffs a reasonable opportunity to bring suit, while protecting defendants and the court system from stale claims that may be fraudulent, manufactured or spurious and are certainly difficult to fairly and efficiently resolve. *Lemmerman v Fealk, 449 Mich 56, 65; 534 NW2d 695 (1995); Gebhardt, 444 Mich at 544; Lothian, 414 Mich at 166-167. See also: Levy (Markman dissenting), 463 Mich 501-502.* The Supreme Court has not shied away from barring tort claims where the claimants failed to diligently pursue the claims within the statutory limitation period. *Lemmerman, supra; Gebhardt, supra* [applying *§5838*]; *Lothian, supra.*

As Justice Markman shrewdly recognized, extending the two year accrual period to the end of a potentially lengthy ongoing professional relationship would undoubtedly, unduly, and unfairly: prolong professionals' apprehension of litigation to unacceptable lengths; increase the inability of professionals to marshal an effective defense; and, place real burdens upon the

judicial system to resolve stale and, therefore, untriable malpractice claims. *Levy (Markman dissenting), supra.*

In short, the Supreme Court is encouraged to seize upon this case as an opportunity to mandate that *MCL 600.5805(6)* and *MCL 600.5838(1)* require non-medical professional malpractice claims to be filed within two years of the specific professional services out of which the claims arise, with no exception or extension of time permitted based upon allegations or evidence of a continuing generalized relationship between the parties. Since this case reflects one of many conflicting opinions by the Court of Appeals and since the issue is one of legislative intent, the Court may elect to repudiate or overrule any inconsistent language appearing in *Levy, Morgan,* and their progeny. See: *Trentadue v Gorton, 479 Mich 378, 393; 738 NW2d 664 (2007)* [overruling incorrect judicial construction of portions of the Revised Judicature Act providing for comprehensive approach to statutory periods of limitation and accrual]; *Robinson v Detroit, 462 Mich 439, 463; 613 NW2d 307 (2000)* ["(s)tare decisis is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions determining the meaning of statutes."].

Alternatively, the Supreme Court could clarify that *Levy* and *Morgan* did not adopt a broad view of *§§5805(6)* and *5838(1)* which expands the accrual of malpractice claims until the termination of the "whole" professional relationship; rather, the Court's prior decisions tested accrual against the specific acts and omissions out of which the claims arise. See, i.e., *Loweke v Ann Arbor Ceiling and Partition Co, 489 Mich 157, 159, 168-173; 804 NW2d 553 (2011)* [Court opted to clarify *Fultz v Union-Commerce Assocs, 470 Mich 460; 683 NW2d 587 (2004)* which had produced confusing, inconsistent, and irreconcilable state and federal appellate decisions].

Regardless of how the Court explains its rejection of any continued application of a "continuous generalized relationship" exception or extension to the statutory accrual periods for non-medical professional malpractice claims, the Defendants submit that the resulting rule of law is warranted by the facts in this case.

Count I of Plaintiff's Complaint sets forth legal malpractice claims arising out of certain and discrete acts and omissions on the part of the Defendant attorneys concerning isolated, independent and distinct legal services provided to three separate corporate clients; specifically:

- the formation and dissolution of FHC in which Bernstein was a 50% shareholder;
- the formation of FAHC in which Bernstein was only a 2% shareholder;
- the failure to prevent Bernstein from unwittingly ratifying the 2% share distribution in FAHC; and,
- the formation of Sunset Blvd, in which Bernstein was allegedly to be a 50% partner but in which Bernstein was given no equity interest from the outset.

(Complaint, ¶¶ 18-20, 25-28, 37, 44, 48, 53, 54; Apx 59a-65a, 71a-77a. See also: Bernstein Dep, Apx 137a-139a).

Bernstein has not and cannot dispute that he discovered each and every one of his malpractice claims as early as November of 2005 and no later than June of 2006 (COA Op, Apx 8a; Complaint ¶¶31, 35, Apx 61a-62a; Interrog Ans 27, Apx 96a; Bernstein Dep, Apx 120a, 123a, 125a, 129a, 131a, 140a).

Bernstein also never challenged or countered the documentary evidence which established that the random and intermittent dates of last service for each of Plaintiff's specific claims of professional malpractice are:

- August 16, 1991 – the date when FHC was formed;

- February 9, 1999 – the date when FHC was dissolved;
- December 18, 1998 – the date when FAHC was incorporated and its shares allocated;
- December 29, 2000 – the date when Bernstein consented to the allocation of FAHC shares; and
- May 15, 2002 - the date when Sunset Blvd was incorporated and its shares allocated.

(Apx 17a-21a, 41a-44a, 49a-52a, 124a, 145a)

Therefore, pursuant to the unambiguous two year accrual period set forth in *§5805(6)* and *§5838(1)* tied to the last date of each professional service, the absolute filing deadlines for Bernstein's various malpractice claims were:

- August 16, 1993;
- February 9, 2001;
- December 18, 2000; and,
- May 15, 2004.

Gebhardt, supra; Kloian, supra; Chapman, supra.

However, Bernstein did not file his Complaint until April 28, 2008 – a date that is nearly seventeen years after the first specific legal service, six years after the final specific service, and, incidentally, two and half years after the claims were discovered. The necessary conclusion: Bernstein failed to diligently pursue his claims as required by *§§5805(6)* and *5838* and, hence, his untimely claims must be barred. *Lemmerman, supra; Gebhardt, supra; Lothian, supra.* See also: *Levy (Markman, dissenting), supra; Azzar (Markman, dissenting), supra; Kloian, supra; Chapman, supra, Masterguard Home Sec, supra; Alken-Ziegler, supra.*

More to the point, Michigan statutory law does not and Michigan common law should not permit extension of the "date of last service rule" in this case until April 28, 2006 when, on

behalf of corporate client FAHC, the Defendants "enjoyed" one last communication with shareholder Bernstein regarding the termination of Bernstein's business relationship with FAHC. A contrary result would unjustly penalize the Defendants and the judicial system with the costs and burdens associated with litigation of grossly stale claims. A contrary result would also set a dangerous precedent which could ultimately wreak havoc with the application of reasonable limitation periods within the context of legal malpractice actions, in general, and actions against corporate or general counsel, in particular.

Specifically, it has been, and will continue to be, difficult, nigh impossible, to fairly defend against and try Plaintiff's malpractice claims on the merits. Not surprisingly, in the **twenty-four** years that have elapsed since the Defendants first acted to incorporate FHC, witnesses have died or become otherwise unavailable, the memories of available witnesses have faded and/or are erapidly fading, and necessary documents can no longer be located (Mt Trans, pp 7-8, Apx pp 156a-157a[27]). Surely, the Legislature did not intend to extend or expand accrual of legal malpractice claims possessed by individual shareholders and arising out of specific and discrete acts and omissions of corporate counsel related to corporate formation and share allocation in three separate corporations until decades later when that shareholder elects to sell or tender back his shares in one of the corporations.

From a wider socioeconomic perspective, once a corporation - and certainly a close corporation - is formed, any and all legal services performed by long-time corporate counsel

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[27] "(Mr. Thomas for Defendants) Now, why do we have statutes of limitations, Judge? We have them because it is unfair to call a Defendant into Court to defend against charges long after witnesses are gone, long after memories have faded, long after evidence has disappeared. I started this by telling you this, this thing started twenty, twenty some years ago, twenty-one years ago this started.

Mr. Turner contacted me a week or two (ago) and asked me if we could schedule the deposition of Mr. Bess' former secretary. I did a little digging and I found out she's 89 years old and, incapable of providing any reasonable testimony. That's exactly why we have statutes of limitation."

could easily be characterized as continuous and interrelated. As Justice Markman seems to already appreciate, unlike human beings, corporations do not have finite natural lives and corporate entities can exist and have existed for hundreds of years. *Levy (Markman dissenting), 463 Mich at 501-502.* The Michigan Legislature could not have intended to consign corporate counsel to decades of legal limbo as potential malpractice claims linger until the corporate client dissolves or, as in this case, an individual shareholder resigns.

Indeed, carrying this Court of Appeals' broad application of the "continuous and generalized relationship" exception/extension to its logical conclusion, if Bernstein was still a shareholder in a still operating FAHC, then Bernstein's claims arising out of any corporate legal services to FAHC, as well as any services to separate corporations FHC and Sunset Blvd, would still not have accrued, even though the professional services out of which the malpractice claims arise occurred between 15 and 24 years ago!

In conclusion, the Defendants request the Supreme Court to:

- hold that Michigan law does not or will no longer sanction application of the "continuous generalized relationship" exception to or expansion upon the two-year accrual period for malpractice claims set forth in *MCL 600.5805(6) and 5838(1);* and, as a result,
- reverse the Court of Appeals and remand this matter to the Oakland County Circuit Court for reinstatement of the Order Granting Summary Disposition to the Defendants pursuant to *MCR 2.116(C)(7).*

Kuznar, supra; Boyle, supra; Gebhardt, supra; Maiden, supra; McLaughlin, supra; Warren Cons Sch, supra.

Alternatively, if the Court is disinclined to repudiate the "continuous generalized relationship" exception/extension in the context of this legal malpractice action, then the

Defendants contend that the Court of Appeals' opinion must still be reversed because the record conclusively demonstrates that Plaintiff failed to prove that his malpractice claims fall inside this extension/exception to the two year statutory accrual period.

C. Plaintiff failed to meet the burden of proving that his legal malpractice claims arose out of continuous and generalized routine services provided under a mutually recognized relationship of trust and dependency such as would entitle him to file his claims outside of the two year accrual period which commences on the date of the last specific legal service.

Assuming for the purposes of argument, only, that Michigan recognizes a "continuous generalized relationship" extension or exception to the two year statutory accrual period for legal malpractice claims, Defendants contend that the Court of Appeals clearly erred by determining that Plaintiff Bernstein met the burden of proving his claims fall within the extension/exception.

At the outset, the Court of Appeals erroneously relied upon the allegations in the Complaint to justify characterization of the relationship between Bernstein and the Defendants as "continuous", "generalized", and "routine" through 2006. The Complaint itself confirms that there are no allegations of legal malpractice related to routine and continuous services at all, and certainly none related to services provided in 2006. The malpractice claims as plead also do not arise out of legal services related to Bernstein's termination of his shareholder status in FAHC in 2006. Rather, again, Bernstein's claims arise exclusively out of discrete professional services related specifically to the formation, share allocation, and/or dissolution of three separate and distinct corporate entities and provided at random and isolated intervals between 1991 and 2002 (Apx 57a-66a, 69a-78a).

It simply defies all common sense and logic to deem Bernstein's claims as arising out of generalized, routine, and on-going legal services to the same client when it is undisputed that Bernstein's claims arise out of particular and independent legal services related to the formation or dissolution of **three** different corporate entities! For this reason alone, the "continuous representation" doctrine has no application in this case. *Levy, supra; Morgan, supra; Boss, supra; Charfoos, supra.* See also: *Old CF, Inc, supra;*

Even if the Complaint is generously viewed as sufficiently averring that, between 1991 and 2006, the Defendants provided various continuous and routine services to corporate clients FHC, FAHC, and Sunset Blvd, the fact remains that the Complaint does not identify the nature of such routine services (Apx 57a-66a, 69a-78a). More to the point, Plaintiff's malpractice claims do not arise out of every routine legal service provided between 1991 and 2006 to the three corporations. Instead, and once again, Bernstein's malpractice claims arise specifically and exclusively out of: the 1991 formation and stock distribution in and the 1999 dissolution of FHC; the 1998 formation of and share distribution in FAHC; and, the 2002 formation of and share distribution in Sunset Blvd (Apx 57a-66a, 69a-78a).

Additionally, and, as matter of law, the Court of Appeals in this case was required to go beyond the Complaint and accept as true **all** the uncontroverted documentary evidence submitted by the parties. *MCR 2.116(G)(5); Kuznar, supra; Maiden, supra.* And, the burden was squarely upon Plaintiff Bernstein to prove that his malpractice claims fell within the two year accrual period or, in this case, the "continuous generalized relationship" exception/extension to the two year period. *McLaughlin, supra; Warren Consol Sch, supra.*

To support its *(C)(7)* Motion, the Defendants produced evidence, including admissions by Bernstein, which demonstrated that:

- there was no continuous and exclusive relationship of trust and confidence between Bernstein and the Defendant corporate counsel (Apx 22a-23a, 29a-31a, 59a-60a, 71a-72a, 94a-95a, 102a-111a, 117a, 120a, 145a);
- the professional services out of which Bernstein's legal malpractice claims arise involve distinct transactions for three different corporate clients with each independent

transaction dependent upon a particular and unique body of information and data peculiar to the client (Apx 13a-16a, 17a-56a, 89a-145a);

- between 1991 and 2002, the Defendants discontinued serving FHC, FAHC, and Sunset Blvd as to the corporate formation, share allocation, and dissolution services out of which Bernstein's malpractice claims arise (Apx 17a-21a, 41a-54a, 60a, 72a, 106a, 120a-121a, 145a);
- Bernstein discovered his malpractice claims between 2005 and 2006 (Apx 61a, 62a, 73, 76a, 120a, 125a, 129a, 131a, 140a); and,
- even though Bernstein admittedly possessed no evidence of wrongdoing on the part of Defendants in the performance of concededly authorized legal action on behalf of FHC, FAHC, and Sunset Blvd, he sued the Defendants to obtain evidence to substantiate future claims against Poss (Apx 62a-65a, 74a-77a, 140a-144a).

In response, Plaintiff produced: deposition testimony to the effect that he subjectively believed that the Defendant corporate attorneys also represented his personal interests as shareholder (Apx 100a-146a); and, a letter dated April 28, 2006, wherein, on behalf of FAHC, the Defendants: acknowledged in writing that Bernstein had terminated his shareholder status in FAHC; reminded Bernstein he was contractually bound to honor non-compete, confidentiality, and non-solicitation clauses in favor of FAHC; and, provided Bernstein with deadlines for share tender and redemption (Apx55a-56a, 100a-146a, 158a-164a).

Citing to *Levy* and *Nugent,* the Court of Appeals held that Plaintiff's evidence sufficiently demonstrated that his legal malpractice claims were timely under the "continuous generalized relationship" exception/extension to the two year statutory accrual period (Apx 9a-10a). However, the mandated review of the entire record compels the **opposite** conclusion.

At the outset, this Court made patently clear in *Levy* that, merely because the Defendant corporate counsel may have also provided "generalized" and "routine" legal services to FHC, FAHC, and Sunset Boulevard, starting in 1991 and continuing through and after Bernstein formally severed his relationship with the corporations in 2006, the providing of such additional legal services does not permit an extension of the two year accrual period with respect to disparate specific legal services performed between 1991 and 2002. *Id, 468 Mich at 489.* See also: *Cummings, supra; Anderson, supra; Traynor, supra; Masterguard Sec, supra; Boss, supra; Charfoos, supra; Gould, supra; Mamou, supra; Kloain, supra; Alken-Ziegler, supra; Balcom, supra; Dettlop, supra; Old CF, supra.*[28]

Additionally, in sharp contrast to *Levy,* and *Nugent,* as well as *Morgan,* the documentary evidence submitted by the Defendants in support of summary disposition, including Bernstein's testimonial admissions, negates mere allegations that Bernstein instituted and continuously enjoyed an actual attorney-client relationship with the Defendants as corporate counsel.

Here it is crucial to note that the Defendants do not admit and have never admitted that an attorney-client relationship existed between them and Bernstein with respect to legal matters involving FHC, FAHC, and Sunset Blvd (Apx 80a-85a). Actually, and as a matter of law, with respect to all corporate legal services at issue, the professional relationship was with the **corporations**, **only**. *Beaty v Hertzberg & Golden, P.C., 456 Mich 247, 260; 571 NW2d 716 (1997); Prentis Fam Found, Inc v Karmanos Cancer Inst, 266 Mich App 39, 44; 698 NW2d 900*

[28] Other jurisdictions which recognize a "continuous representation" doctrine in connection with the running of application statutory limitation periods require the plaintiff pursuing legal malpractice claims against corporate counsel to demonstrate that the continuous professional service was in conjunction with the particular transaction(s) that is/are the subject of the malpractice claims, and not merely connected in some way to a general professional relationship. See, i.e., *Sin Hang Lee v Brenner, Saltzman, et al, 2010 Conn Super LEXIS 38 (1/12/10); Piteo v Gottier, 112 Con App 441, 448-449; 963 A2d 83 (2009); Sun Graphics Corp v Levy, Davis, et al, 2011 NY Misc LEXIS 7127 (SCt NY, 4/1/11); Byron Chem Co v Groman, 61 AD3d 909, 910; 807 NYS2d 457, 459 (2009); State ex rel Long v Petree Stockton, LLP, 129 NC App 432, 441-444; 499 SE2d 790, 796-798 (1998).*

(2005), lv den, 474 Mich 871; 703 NW2d 816 (2005); Scott v Green, 140 Mich App 384, 397, 400; 364 NW2d 709 (1985).

In any event, as a matter of undisputed fact, in their capacity as general corporate counsel for FHC, FAHC and Sunset Blvd, the Defendants had no relationship whatsoever with Bernstein.

Specifically, Bernstein entered into business negotiations with Poss knowing that the Defendants had long represented Poss and his corporate interests (Apx 95a, 102a-106a, 111a, 145a). The Management Services Agreement subsequently signed by Poss, as president of DMCI, Bernstein, individually, and Bernstein as president of FHC, conferred exclusively upon Poss/DMC the authority to retain and instruct legal counsel for FHC (Apx 22a-23a). The agreement also irrevocably designated Poss as the attorney-in-fact for Bernstein and FHC for the purposes of dissolution and liquidation of the corporation (Apx 29a-30a). Bernstein voluntarily executed the Management Services Agreement after acknowledging that he received the advice of his own private attorney, Kenneth Gross (Apx 31a, 95a, 102a, 104a-106a, 111a, 145a).

Bernstein also admits that, via a separate management corporation in which Bernstein had no interest, **Poss hired the Defendants** to serve as FHC's corporate counsel (Apx 58a, 60a, 70a, 72a, 94a-95a, 117a). Similarly, it is undisputed that the incorporation and management of FAHC was directed solely by Poss, including all interactions with FAHC corporate counsel (Apx 59a-60a, 145a). It is otherwise uncontroverted that Bernstein was not authorized to and did not contact the Defendant corporate attorneys on behalf of any of the three corporate entities for legal advice and services (Apx 58a-60a, 70a-72a; 94a-99a, 117a, 125a, 145a). Most remarkably, the April 28, 2006 letter, which Bernstein and the Court of Appeals maintain was written on Bernstein's behalf, was obviously prepared by the Defendants on behalf of FAHC to insure that Bernstein's future actions were not contrary to FAHC's best interests (Apx 55a-56a).

Plaintiff's previous arguments notwithstanding, application of the "continuous generalized relationship" exception/extension cannot be vindicated by unsubstantiated assertions that Defendants utilized routine and generalized legal services to conceal their alleged malpractice regarding corporate share allocation: Bernstein has admitted under oath that, at every annual meeting between 1991 and 2006, he had **unfettered access** to all corporate documents (Apx 118a, 122a-123a, 128a-129a).

Additionally, it is not enough that Bernstein claims to have unilaterally placed dependency, trust and confidence in the Defendants. Again, the undisputed evidence reveals that Bernstein relied upon the professional services of attorney Ken Gross before he entered into business arrangements with Poss, knowing full well that the Defendants were acting on behalf of long-time client Poss, only. Bernstein produced no evidence tending to establish that he was not free to retain independent counsel to review corporate documents or otherwise act on behalf of Bernstein's shareholder interests. Certainly, and unlike the plaintiff in *Morgan*, there is no evidence that Bernstein was contractually bound to obtain legal services from the Defendants.

Moreover, it is undisputed that, in 2005, Bernstein specifically directed attorney Gross to investigate Bernstein's suspicions regarding the true amount of his corporate equity interest, (Apx 61a, 73a, 120a). The Court of Appeals simply – and inexcusably – failed/refused to recognize that this uncontroverted evidence demonstrated disruption of the claimed professional relationship between Bernstein and the Defendants and, as such, operated to bar application of the "continuous generalized relationship" doctrine. *Levy, supra; Morgan, supra.* See also: *Wright, supra; Kloian, supra; Estate of Mitchell, supra.*

Finally, paramount policy considerations, which decry judicial tolerance of spurious and vindictive claims, serve to preclude application of the "continuous generalized relationship" doctrine in light of Bernstein's admissions that:

- the Defendants' allegedly negligent acts and omissions relate to fully authorized legal services on behalf of the corporate clients;
- he filed suit even though he has no evidence that the Defendants engaged in any wrongdoing that caused his alleged financial losses; and,
- he filed suit to gain evidence to utilize against Poss, the actual tortfeasor and Bernstein's intended target.

(Apx 62a-65a, 74a-77a, 120a, 134a, 140a-141a, 143a-144a). See: *Lemmerman, supra; Gebhardt, supra; Lothian, supra; Levy (Markman, dissenting), supra.*

The bottom line is that the undisputed evidence conclusively demonstrates that, at all times relevant: the Defendants' attorney-client relationship was with the three corporate entities formed and managed by Poss, only; all legal services were provided on behalf of the corporations, only; and, no individualized legal services were provided to Bernstein as corporate shareholder. More to the point, neither the April 28, 2006 letter, nor any other evidence, supports a conclusion that, through 2006, the Defendants provided generalized and continuous legal services out of which Bernstein's malpractice claims arise. As such, Plaintiff is not permitted to invoke a "continuous and generalized relationship" exception/extension to *MCL 600.5838(1)* that would delay commencement of the two-year accrual period set forth in *MCL 600.5805(6)* beyond the specific dates of last professional services out of which the instant malpractice claims arise. *Levy, supra; Morgan, supra; Boss, supra; Mamou, supra; Charfoos, supra; Kloain, supra; Old CF, supra.*

Therefore, the Defendants respectfully request the Court to reverse the Court of Appeals and remand this matter to the Oakland County Circuit Court for reinstatement of the Order Granting Summary Disposition to the Defendants pursuant to *MCR 2.116(C)(7). Kuznar, supra; Boyle, supra; Gebhardt, supra; Maiden, supra; McLaughlin, supra; Warren Cons Sch, supra.*

CONCLUSION AND RELIEF REQUESTED

For the reasons stated, the Defendants-Appellants, Seyburn, Kahn, Ginn, Bess & Serlin, P.C. and Barry R. Bess, respectfully request this Honorable Supreme Court to reverse the Court of Appeals Opinion of February 26, 2014, and reinstate the November 29, 2012 Opinion and Order of the Circuit Court granting summary disposition of Plaintiff's Complaint pursuant to *MCR 2.116(C)(7).*

Respectfully submitted,

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EXHIBIT 1

Cummings v. Cohen Law Office

Court of Appeals of Michigan

June 12, 2014, Decided

No. 314753

Reporter
2014 Mich. App. LEXIS 1091; 2014 WL 2620991

DAVID R. CUMMINGS and MICHELE CUMMINGS, Plaintiffs-Appellants, v COHEN LAW OFFICE, PC, and CHARLES J. COHEN, Defendants-Appellees.

Prior History: [*1] Oakland Circuit Court. LC No. 2011-122685-NM.

Core Terms

services, summary disposition, malpractice, termination, completion, legal malpractice action, statute of limitations, trial court, attorney-client, discontinues, defendants', ministerial, contending, undisputed, accrues, parties, serving

Judges: Before: SAWYER, P.J., and METER and FORT HOOD, JJ.

Opinion

Per Curiam.

In this legal malpractice action, plaintiffs appeal by right the order granting defendants' motion for summary disposition. We affirm.

In 2004, plaintiff, David R. Cummings, was injured in two separate automobile accidents. In December 2004, he retained defendant, Charles J. Cohen, to represent him. On July 24, 2006, defendant mailed a letter confirming that the representation of plaintiff was complete. Although plaintiffs had contact with defendant after the termination through telephone calls, defendant never formally represented plaintiffs and did not bill them for services. In 2011, plaintiffs filed this legal malpractice action, contending that defendants failed to pursue attendant care services, resulting in a loss of benefits between 2004 and 2010. Defendants moved for summary disposition contending that the statute of limitations expired because of the termination of the parties' relationship in 2006, and the trial court agreed. From this ruling, plaintiffs now appeal.

The trial court's decision regarding a motion for summary disposition and the application of the statute [*2] of limitations are reviewed de novo. *Zwiers v Growney, 286 Mich App 38, 41-42; 778 NW2d 81 (2009)*. Generally, the limitations period for a legal malpractice claim is two years from the date the claim accrues. *MCL 600.5805(6)*; *Kloian v Schwartz, 272 Mich App 232, 237; 725 NW2d 671 (2006)*. A claim of malpractice accrues at the time the person discontinues serving the plaintiff in a professional capacity out of which the claim for malpractice arose. *MCL 600.5838(1)*. "A lawyer discontinues serving a client when relieved of the obligation by the client or the court, or upon completion of a specific legal service that the lawyer was retained to perform." *Maddox v Burlingame, 205 Mich App 446, 450; 517 NW2d 816 (1994)* (citations omitted). The completion of administrative or ministerial tasks following the conclusion of legal representation does not extend the date of accrual of a claim for legal malpractice beyond the termination date of the attorney-client relationship. *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, PC v Bakshi, 483 Mich 345, 360; 771 NW2d 411 (2009)*.

In the present case, it is undisputed that defendant gave plaintiffs written notice of the conclusion of his representation in [*3] 2006. Despite the conclusion of his services, plaintiffs contend that evidence of phone calls to defendant as well as his submission of medical bills to their insurer demonstrate a continuing relationship. However, it is undisputed that a renewed formal agreement of representation was not signed,

and defendant did not bill for any services. The completion of "follow-up or ministerial services" does not extend the attorney-client relationship. *Seyburn, 483 Mich at 360*. Accordingly, the trial court properly granted defendants' motion for summary disposition.

Affirmed. Defendants, the prevailing parties, may tax costs. *MCR 7.219*.

/s/ David H. Sawyer

/s/ Patrick M. Meter

/s/ Karen M. Fort Hood

EXHIBIT 2

Anderson v. David & Wierenga

Court of Appeals of Michigan

April 10, 2012, Decided

No. 301946

Reporter
2012 Mich. App. LEXIS 635

ROBERT L. ANDERSON, JR., LISA A. ANDERSON, 1098 INVESTMENTS L.L.C., and COOPERSVILLE MOTORS, INC., Plaintiffs-Appellants, v DAVID & WIERENGA, P.C., and RONALD E. DAVID, Defendants-Appellees.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Leave to appeal denied by *Anderson v. David & Wierenga, P.C., 2012 Mich. LEXIS 1445 (Mich., Sept. 4, 2012)*

Prior History: [*1] Kent Circuit Court. LC No. 09-012883-CK.

Core Terms

malpractice, plaintiffs', dealership, trial court, summary disposition, statute of limitations

Judges: Before: FITZGERALD, P.J., and WILDER and MURRAY, JJ.

Opinion

Per Curiam.

In this legal malpractice case, plaintiffs appeal as of right the trial court's order granting summary disposition to defendants pursuant to *MCR 2.116(C)(7)*. We affirm.

This case arises out of defendant Ronald E. David's legal representation of plaintiffs in conjunction with plaintiffs' purchase of an automobile dealership from Terry Kraker. The purchase of the dealership closed in February and March of 2007. In December 2009, plaintiffs filed a claim against defendants, alleging that defendants committed malpractice by, among other things, failing to adequately perform due diligence in conjunction with the purchase, structuring the purchase as a stock sale, and failing to protect plaintiffs' interests. Plaintiffs also asserted a quantum meruit claim, contending that as a result of the malpractice, defendants were unjustly enriched. Defendants moved for the grant of summary disposition by the trial court, alleging that plaintiffs' claims were barred by the statute of limitations for malpractice actions and that plaintiffs failed to establish genuine issues of fact as to the proximate [*2] cause and duty elements of their claims. The trial court granted defendants' motion pursuant to *MCR 2.116(C)(7)*, finding that defendants' legal service had terminated in February and March of 2007 or, at the latest, in October of 2007 and that, as a result, plaintiffs' claims were time barred.

"A trial court's decision to grant or deny a motion for summary disposition is reviewed de novo on appeal." *Young v Sellers, 254 Mich App 447, 449; 657 NW2d 555 (2002)*. When no disputed questions of fact are presented, whether a claim is barred by a statute of limitations is also a question of law reviewed de novo. *Id. at 450*. A motion for summary disposition under *MCR 2.116(C)(7)* requires a reviewing court to consider all of the documentary evidence submitted by the parties and to accept all of the plaintiff's well-pleaded allegations as true unless those allegations are specifically contradicted by the documentary evidence. *Kuznar v Raksha Corp, 481 Mich 169, 175-176; 750 NW2d 121 (2008)*.

Pursuant to *MCL 600.5805(6)*, a malpractice claim must be commenced within two years of the date when the claim accrued. *Kloian v Schwartz, 272 Mich App 232, 237; 725 NW2d 671 (2006)*. *MCL 600.5838(1)* provides [*3] that a malpractice claim against a licensed professional "accrues at the time that [professional] discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose."

"A lawyer discontinues serving a client when relieved of the obligation by the client or the court or upon completion of a specific legal service that the lawyer was retained to perform." *Maddox v Burlingame, 205 Mich App 446, 450; 517 NW2d 816 (1994)* (citations omitted). The formal discharge of an attorney is not required to end the attorney-client relationship. *Wright v Rinaldo, 279 Mich App 526, 537; 761 NW2d 114 (2008)*. "Some of a lawyer's duties to a client survive the termination of the attorney-client relationship." *Bauer v Ferriby & Houston, PC, 235 Mich App 536, 539; 599 NW2d 493 (1999)*. To determine whether such activities extend the legal representation, "the proper inquiry is whether the new activity occurs pursuant to a current, as opposed to a former, attorney-client relationship." *Id.* Follow-up activities such as advising a former client of a change in the law or investigating and attempting to remedy any mistake in the earlier [*4] representation are insufficient to extend the period of service. *Id.*

In this case, the specific legal service for which defendants were retained was to provide representation related to the purchase of an automobile dealership. The purchase was finalized in February and March of 2007. There is no evidence that defendants engaged in any activity related to the purchase on behalf of plaintiffs after that time. As a result, there is no question of fact that defendants discontinued serving plaintiffs at that time in their capacity as to the matters out of which the claim for malpractice arose. Plaintiffs' claims related to the purchase of the dealership accrued when the purchase closed in February and March of 2007. Thus, plaintiffs had two years from that time in order to file their legal malpractice action. Since plaintiffs filed the instant action in December 2009, the trial court correctly found that plaintiffs' malpractice claim was barred by the statute of limitations. Additionally, plaintiffs' quantum meruit claim, because it was based on plaintiffs' claims of inadequate representation, also is barred by the malpractice statute of limitations. See *Brownell v Garber, 199 Mich App 519, 525-526; 503 NW2d 81 (1993)*.

Plaintiffs' [*5] contention that e-mails submitted to the trial court established an ongoing attorney-client relationship continuing into February 2008 is without merit.[1] In these e-mails, Robert Anderson informed David that the dealership had been sold,[2] told David that plaintiffs were considering legal action against other parties, and asked David for advice in rescinding the stock purchase and returning the stock to Kraker. David responded by telling Anderson that he could not force Kraker to take the stock back and by asking if Buckman was working on the issues. Looking at these communications in a light most favorable to plaintiffs shows that the e-mails do not suggest an ongoing representation surrounding the purchase of the dealership, but rather indicate that plaintiffs were seeking new legal services in dealing with the problems encountered in the acquired dealership. This type of activity does not affect our analysis because this type of representation was unrelated to the "matters out of which the claim for malpractice arose." See *Balcom v Zambon, 254 Mich App 470, 484; 658 NW2d 156 (2002)*.

In sum, in March 2007, defendants discontinued representing plaintiffs regarding the purchase of the dealership, at which time plaintiffs' claims accrued. The statute of limitations expired on plaintiffs' claims two years later, *MCL 600.5805(6)*, in March 2009. But plaintiffs filed their complaint approximately nine months after this deadline in December 2009. Therefore, the trial court properly granted defendants' motion for summary disposition pursuant to *MCR 2.116(C)(7)*.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Kurtis T. Wilder

/s/ Christopher M. Murray

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[1] Plaintiffs also submitted other documentation to this Court that was only submitted to the trial court [*6] with their motion for reconsideration. But because the trial court did not have these materials available *at the time it made its decision on the motion for summary disposition*, we will not consider them. *Quinto v Cross & Peters Co*, 451 Mich 358, 366 n 5; 547 NW2d 314 (1996); *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

[2] Previously, Anderson informed David that he intended to sell the dealership. David referred Anderson to another attorney, Jeffrey Buckman, who represented plaintiffs during the sale.

EXHIBIT 3

Traynor v. McMillen

Court of Appeals of Michigan

August 5, 2010, Decided

No. 289284

Reporter
2010 Mich. App. LEXIS 1504; 2010 WL 3062537

WILLIAM TRAYNOR and PATRICIA TRAYNOR, Plaintiffs-Appellants, v JOSEPH C. MCMILLEN, Defendant-Appellee.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Oakland Circuit Court. LC No. 07-085355-NM.

Core Terms

damages, summary disposition, trial court, non economic damages, mortgage, full credit bid, malpractice, plaintiffs', sanctions, percent interest, invested, statute of limitations, discontinued, guaranteed, serving, plaintiff's claim, defense motion, substantiated, foreclosure, deposition, distress

Judges: Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ. GLEICHER, J. (concurring).

Opinion

PER CURIAM.

Plaintiffs appeal by right the trial court's order granting defendant's two motions for summary disposition and dismissing the case. We affirm.

Plaintiffs first argue that the trial court erred in finding that count one of their two-count complaint was barred by the statute of limitations. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition under *MCR 2.116(C)(7)* (claim is barred by statute of limitations). *DiPonio Construction Co v Rosati Masonry Co, 246 Mich App 43, 46; 631 NW2d 59 (2001)*. When reviewing a motion for summary disposition under *MCR 2.116(C)(7)*, the trial court must accept the nonmoving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor to determine whether any factual development could provide a basis for recovery. *Amburgey v Sauder, 238 Mich App 228, 231; 605 NW2d 84 (1999)*. The court must consider any pleadings, affidavits, depositions, admissions, or other documentary evidence that has been submitted by the parties; however, the moving party is not [*2] required to file supportive material. *Maiden v Rozwood, 461 Mich 109, 119; 597 NW2d 817 (1999)*.

Until this lawsuit, defendant had been plaintiffs' long-time family attorney, specializing in real estate for about 25 years. Plaintiffs, husband and wife, allege that defendant committed legal malpractice with regard to two separate real estate matters: one involving plaintiffs' purchase of a condominium (the Berryman matter), another involving plaintiff William Traynor's investment in a real estate development at defendant's behest (the Deer Run matter). [1]

In March 2002, plaintiffs, represented by defendant, filed suit against the Berrymans alleging various acts of fraud in connection with a 1995 real estate transaction. In November 2002, plaintiffs received a case evaluation award of $ 4,000. The Berrymans accepted the award, but plaintiffs, by virtue of not submitting an acceptance, rejected it. In April 2003, the trial court granted the Berrymans' motion for summary disposition, finding that plaintiffs' [*3] claims were barred by the six-year statute of limitations. The trial court granted the Berrymans' post-judgment motion for case evaluation sanctions in the amount of $ 5,695. Plaintiffs allege that defendant never notified them of the case evaluation

[1] Count one of plaintiffs' complaint is brought by both plaintiffs, while count two is brought by plaintiff William only. All references to "plaintiff," individually, refer to William.

award. Plaintiffs indicate that they did not learn of the case evaluation award or the sanctions levied upon them until their bank account was garnished in November or December 2003 to satisfy the sanctions judgment. Count one of plaintiffs' complaint alleges that defendant failed to file suit against the Berrymans within the time permitted by the statute of limitations and failed to notify plaintiffs of the case evaluation award, which they would have accepted had they been aware of it.

The statute of limitations for a legal malpractice claim expires at the later of the following two time periods: two years after the attorney discontinues serving the plaintiff in a professional capacity as to the matters out of which the claim for malpractice arose, or six months after the plaintiff discovers or should have discovered the existence of the malpractice claim. MCL 600.5805(6); MCL 600.5838. A lawyer discontinues serving a client upon completion [*4] of the specific legal service from which the malpractice claim arose that the lawyer was retained to perform. MCL 600.5838(1); Kloian v Schwartz, 272 Mich App 232, 238; 725 NW2d 671 (2006).

The critical issue here is determining the date upon which defendant discontinued serving plaintiffs in the Berryman matter. Plaintiffs filed this action on January 19, 2006. In April 2003, the Berryman defendants' motion for summary disposition was granted, and an order was entered dismissing all of plaintiffs' claims with prejudice. Defendant also represented plaintiffs in post-judgment proceedings for case evaluation sanctions. On June 11, 2003, the trial court entered an order awarding case evaluation sanctions to the Berrymans. The 21-day period of appeal for this order expired on July 2, 2003. No appeal was pursued, and defendant did no further work for plaintiffs after the order granting the case evaluation sanctions was entered.

MCR 2.117(C)(1) proves helpful in ascertaining the date of defendant's last day of legal services. It provides, in pertinent part:

> Unless otherwise stated or ordered by the court, an attorney's appearance applies only in the court in which it is made, or to which the [*5] action is transferred, until a final judgment is entered disposing of all claims by or against the party whom the attorney represents and the time for appeal of right has passed. $ (MCR 2.117(C)(1).]

In light of MCR 2.117(C)(1), we agree with defendant's position that he discontinued serving plaintiffs regarding the Berryman matter, at the latest, in July 2003, after the appeal period regarding the post-judgment order of sanctions expired. Plaintiffs' arguments to the contrary are unpersuasive. The fact that neither the trial court nor plaintiffs formally announced that defendant's legal representation had ceased as of July 2003 is not dispositive. Neither is the fact that plaintiffs did not fully satisfy the sanctions judgment until February or March 2004, or that docket entries continued to be made in September 2004. What matters is the point at which the lawyer discontinues serving the client. MCL 600.5838(1). That occurs when the lawyer completes the specific legal service that he was retained to perform. Kloian, 272 Mich App at 238. Here, defendant was retained to file suit against the Berrymans for alleged fraud in connection with the real estate transaction. After the case was [*6] dismissed in April 2003, and the post-judgment sanctions order was entered in June 2003 (and the appeals period expired in July 2003), defendant had completed the specific service that he was hired to perform. There was no further legal work for him to do regarding the Berryman matter. Because defendant discontinued serving plaintiffs in July 2003, at the latest, and plaintiffs did not file suit until January 2006, this part of plaintiffs' malpractice action is barred by the statute of limitations. [2] Accordingly, the trial court did not err in granting summary disposition on this ground.

Next, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition regarding count two of the complaint on the basis that plaintiff failed to demonstrate that he suffered compensable damages. We disagree.

This Court reviews de novo the trial [*7] court's decision on a motion for summary disposition under MCR 2.116(C)(10). Maiden, 461 Mich at 118. A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a claim. Id. at 120. In reviewing a motion for summary disposition brought

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[2] Plaintiffs do not benefit from the 6-month discovery period of MCL 600.5838(2) because they discovered, or should have discovered, their claim by November or December 2003, at the latest. This is the date that plaintiffs discovered that a judgment of case evaluation sanctions was entered against them in the Berryman litigation.

under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Maiden, 461 Mich at 120. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. Maiden, 461 Mich at 118, 120.

Count two involves the Deer Run matter. In March 2002, defendant asked plaintiff to invest in a three-parcel residential development named Deer Run Estates. Plaintiff agreed to loan $ 100,000, which was secured by a mortgage. Defendant received an $ 8,000 finder's fee from Deer Run for procuring plaintiff as a lender. This $ 100,000 loan is not at issue on appeal.

Subsequently, [*8] defendant again approached plaintiff in 2002 regarding investing in Deer Run Estates. Defendant encouraged plaintiff to loan $ 350,000 to Deer Run at a rate of 11 percent interest. Plaintiff agreed. In December 2002, the loan was secured by mortgages on three parcels in the Deer Run development. Defendant drafted the promissory note and mortgage documents and charged plaintiff an hourly rate for his legal services. Unknown to plaintiff, defendant also received a $ 12,000 finder's fee from Deer Run for procuring this loan. After Deer Run stopped making payments on the loan, plaintiff filed suit against Deer Run. Defendant did not represent plaintiff in that litigation.

At the conclusion of a bench trial in Oakland Circuit Court, plaintiff received a judgment in his favor in the amount of $ 546,387.03, broken down as follows: $ 131,036.37 due under the March 2002 mortgage note, including interest and court costs, and $ 415,350.66 due under the December 2002 mortgage note, including interest. A judgment of foreclosure was entered with regard to the Deer Run properties. The judgment provided for the recovery of plaintiff's miscellaneous expenses, including, insurance premiums, property [*9] and transfer taxes, and attorney fees associated with the foreclosure. Including all of these miscellaneous expenses, plaintiff's judgment totaled $ 591,456.74. At an auction for the Deer Run property in August 2006, plaintiff acquired the property after bidding the entire amount of his judgment, $ 591,456.74. In count two of the instant complaint, plaintiff alleges that defendant committed legal malpractice by failing to determine, before plaintiff's making the $ 350,000 loan, that the property used to secure the loan was already encumbered by a higher priority mortgage.

The elements of a legal malpractice claim are: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged." Manzo v Petrella & Petrella & Assoc, PC, 261 Mich App 705, 712; 683 NW2d 699 (2004). The trial court granted defendant's motion for summary disposition regarding count two on the ground that plaintiff failed to demonstrate that he suffered compensable damages.

Plaintiff claims that he is entitled to recover economic damages under either of two [*10] alternative theories. First, under the "no loan" theory, plaintiff proposes that he would not have loaned the $ 350,000, but would have instead invested it at a rate of eight percent interest. He would now have $ 518,000, and he also would have avoided $ 57,374.20 in costs associated with maintaining the Deer Run property. Assuming that plaintiff would have made more money had he invested his $ 350,000 at eight percent interest rather than investing it in Deer Run, defendant makes a valid point in arguing that plaintiff's claim is speculative. Plaintiff does not identify an investment that would have guaranteed him eight percent interest. If plaintiff could show that he did suffer damages, and it was only the amount of damages that was in question, summary disposition under MCR 2.116(C)(10) would be inappropriate. However, plaintiff presents no evidence under this theory to support his claim that he was damaged. "[T]he nonmoving party must produce evidence showing a material dispute of fact left for trial in order to survive a motion for summary disposition under [MCR 2.116(C)(10)]." Village of Dimondale v Grable, 240 Mich App 553, 566; 618 NW2d 23 (2000). Plaintiff presents no authority [*11] for the proposition that he can survive summary disposition simply by alleging that he suffered damages, without some admissible evidence substantiating that allegation. Maiden, 461 Mich at 121. So, plaintiff's "no loan" theory fails for lack of adequate substantiation. "A plaintiff asserting a cause of action has the burden of proving damages with reasonable certainty, and damages predicated on speculation and conjecture are not recoverable." Health Call of Detroit v Atrium Home & Health Care Services, Inc, 268 Mich App 83, 96; 706 NW2d 843 (2005).

The second theory of damages contemplates what actually occurred: plaintiff loaned the money to Deer Run and incurs costs in maintaining it. The Deer Run property that plaintiff now owns was appraised in March 2008 at $ 575,000. The judgment that plaintiff was entitled to receive, however, was $ 591,456.74. Thus, claims plaintiff, he has lost $ 16,456.74. As defendant points out, plaintiff's theory fails under the "full credit bid" principle. The "full credit bid" principle bars a claim for economic damages in cases like the instant one where the lender has made a bid equal to the full value of the judgment or loan which secures the property, [*12] and wins the property as the highest bidder. See *New Freedom Mortg Corp v Globe Mortg Corp, 281 Mich App 63, 68-74; 761 NW2d 832 (2008)*, and *Bank of Three Oaks v Lakefront Properties, 178 Mich App 551, 555; 444 NW2d 217 (1989)*. When a mortgagee makes a full credit bid, the mortgage debt is satisfied, and the mortgage is extinguished. *New Freedom Mortgage Corp, 281 Mich App at 68*. Here, plaintiff made a bid equal to the full value of the judgment at the foreclosure sale of the Deer Run property. Plaintiff was the highest bidder, and thus, now owns the property. Plaintiff offers no argument proposing that the full credit bid principle does not apply to the instant case. Accordingly, plaintiff's second theory of economic damages also fails.

Additionally, plaintiff claims an entitlement to noneconomic damages because he has endured worry, mental anguish and emotional distress associated with his retirement funds being at risk. Noneconomic damages may be awarded in a legal malpractice case. *Gore v Rains & Block, 189 Mich App 729, 740-741; 473 NW2d 813 (1991)*.

Plaintiff does not present much in the way of noneconomic damages. The majority of plaintiff's damages argument focuses on economic [*13] damages. In plaintiffs' response to defendant's motion for summary disposition and plaintiffs' appellate brief, plaintiff dedicates a few sentences to noneconomic damages, stating that he suffered noneconomic damages because he has endured worry, mental anguish and emotional distress associated with his "retirement funds being at such risk." Plaintiff provides no further elaboration. It is reasonable to assume that it would be stressful and worrisome to discover that one's retirement funds are in jeopardy. Nevertheless, plaintiff's noneconomic damages claim falls short. Mental anguish damages may be described in terms of "shame, mortification, humiliation and indignity." *Veselenak v Smith, 414 Mich 567, 576; 327 NW2d 261 (1982)*. Mental distress attendant to pecuniary loss is typically insufficient to warrant noneconomic damages, even if the plaintiff is not made whole without them. *Valentine v General American Credit, Inc, 420 Mich 256, 259-261; 362 NW2d 628 (1984)*. We are not suggesting that noneconomic damages are never allowable if they are based on distress stemming from pecuniary loss, only that the instant plaintiff's minimal showing--which lacked details or evidentiary substantiation--is [*14] insufficient to establish a claim for noneconomic damages. Accordingly, the trial court did not err in granting defendant's motion for summary disposition regarding count two, finding that plaintiff did not produce evidence to support his claim that he suffered compensable damages.

Finally, plaintiffs argue that the trial court erred in granting defendant's motion in limine to exclude evidence that the Deer Run attorney paid defendant a total of $ 20,000 in finder's fees for procuring plaintiff as a lender. In light of the resolution of the above two issues, we decline to address this issue because it is moot.

We affirm. As the prevailing party, defendant may tax costs pursuant to *MCR. 7.219*.

/s/ Jane E. Markey

/s/ Brian K. Zahra

Concur by: GLEICHER

Concur

GLEICHER, J. (*concurring*).

I concur with the majority in result, but write separately to express my disagreement with two aspects of the majority's analysis regarding the Deer Run matter.

The majority concludes that because plaintiff William Traynor neglected to "identify an investment that would have guaranteed ... eight percent interest," his "no loan" damages theory "fails for lack of adequate substantiation." *Ante* at 6-7. In my view, plaintiff's "no loan" [*15] damage hypothesis should be rejected because it bears no relationship to the acts of negligence alleged by plaintiff and is precluded by the full credit bid rule. Contrary to the majority's analysis, the evidence otherwise substantiated the reasonableness of an eight percent interest figure.

The "no loan" theory proffered by plaintiff asserts that had he kept his money rather than investing in Deer Run, he would have $ 350,000 in hand for alternate investments. According to plaintiff, the money could have been invested "at even 8% per year using simple interest," which would have yielded a significantly larger cash sum. But regardless of any alternative investment opportunities available to plaintiff when he opted to loan money to Deer Run, defendant's legal malpractice did not proximately cause plaintiff to suffer any damages. Plaintiff testified at his deposition that he loaned Deer Run $ 350,000 because he believed the investment would "enhance [his] monetary position." Plaintiff explained that the attractiveness of the investment included a 10% interest rate. [1] When plaintiff made the loan, he believed that he had a first-priority mortgage on the land that secured the investment [*16] and reduced his risk. Plaintiff further averred at his deposition that the $ 350,000 loan "was a guaranteed investment. It was guaranteed . . . by the property." Thus, plaintiff's testimony reflects his clear understanding that if the borrower defaulted, the value of the property would suffice to cover the amount of his loan. This bargain envisioned that in the foreseeable event the loan was not repaid, plaintiff would be made whole through an interest in the property, instead of through principal and interest payments.

Although defendant negligently failed to advise plaintiff that other secured creditors stood in higher priority, plaintiff eventually obtained title to the land, precisely the same satisfaction of the borrower's indebtedness as contemplated in the original bargain. In other words, defendant's failure to perform a title search did not proximately cause any damages because plaintiff received one of the alternatives for which he had [*18] bargained. Regardless whether defendant neglected to reveal that other secured creditors had higher priority interests in the land, plaintiff ultimately obtained it. Consequently, the evidence reveals no causal link between defendant's negligence and any damages attributable to the foreclosure.

The full credit bid rule also supports summary disposition in defendant's favor. The full credit bid rule envisions that a lender who makes a full credit bid at a foreclosure sale takes title to the property in full satisfaction of the underlying debt. *New Freedom Mortgage Corp v Globe Mortgage Corp*, 281 Mich App 63, 68; 761 NW2d 832 (2008). In *New Freedom*, this Court applied the full credit bid rule to bar the plaintiff's action against a nonborrower third party. *Id.* at 74-75. Plaintiff's brief does not address the full credit bid rule, and I can discern no reason to forbear its application against a nonborrower third party under the circumstances presented here.

I also respectfully disagree with the majority's analysis of plaintiff's claim for noneconomic damages. I would hold that the circuit court correctly granted summary disposition of plaintiff's noneconomic damages claim because he did [*19] not put forward *any* evidence of emotional or mental injury. Plaintiff's complaint does not set forth a claim for noneconomic damages. Plaintiff's answers to interrogatories relating to damages include no mention of noneconomic injuries, but instead assert that $ 350,000 represents "the exact amount of damage you claim to have sustained." Plaintiff's deposition likewise made no mention that he had suffered emotional or mental distress. Had plaintiff pleaded and put forward some facts supporting even a reasonable inference of noneconomic injury, he would have survived defendant's summary disposition motion. However, because the record is entirely devoid of any evidence of this late-raised claim, I agree with its summary dismissal.

/s/ Elizabeth L. Gleicher

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[1] Had defendant's negligence actually caused plaintiff damages, evidence of the loan's 10% interest rate would have sufficed to reasonably support plaintiff's claim that he could have made an investment yielding 8% interest. MCR 2.116(C)(10) permits summary disposition when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A genuine issue of material fact exists when the evidence submitted "might permit inferences contrary to the facts as asserted by the movant." *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 360; 320 NW2d 836 (1982). The [*17] majority's criticism of plaintiff's failure to "identify an investment that would have guaranteed him eight percent interest" is entirely misplaced, given that the parties agreed that the $ 350,000 investment at issue would have guaranteed an even higher interest rate. Had plaintiff shown any link between defendant's negligence and his alleged damages, this circumstantial evidence and the inferences it supports would have sufficiently substantiated the reasonableness of an eight percent interest yardstick and defeated summary disposition. Furthermore, "[i]t is well established that, where the fact of liability is proven, difficulty in determining damages will not bar recovery." *Reisman v Wayne State Univ Regents*, 188 Mich App 526, 542; 470 NW2d 678 (1991).

EXHIBIT 4

Masterguard Home Sec. v. Nemes & Anderson

Court of Appeals of Michigan

July 29, 2010, Decided

No. 291085

Reporter
2010 Mich. App. LEXIS 1481; 2010 WL 2977405

MASTERGUARD HOME SECURITY, d/b/a MASTERGUARD SECURITY SERVICES, BOB SHONCE, and TOM WALTERS, Plaintiffs-Appellants, v NEMES AND ANDERSON, P.C., d/b/a NEMES BUMBAUGH, P.C., THOMAS C. NEMES, JAMES A. BUMBAUGH, and RYAN A. MCKINDLES, Defendants-Appellees.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Oakland Circuit Court. LC No. 2008-089579-NM.

Core Terms

settlement agreement, malpractice, summary disposition, trial court, two year, discontinues, limitations, legal malpractice claim, promissory note, legal services

Judges: Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

Opinion

PER CURIAM.

In this legal malpractice case, plaintiffs Masterguard Home Security, Bob Shonce, and Tom Walters (collectively, "Masterguard") appeal as of right the trial court's order granting defendants Nemes And Anderson, P.C., Thomas C. Nemes, James A. Bumbaugh, and Ryan A. McKindles (collectively, "Nemes & Anderson") summary disposition under *MCR 2.116(C)(7)* and *(10)*. We affirm.

I. BASIC FACTS

In 1998, Bob Shonce and Tom Walters founded Masterguard Home Security, doing business as Masterguard Security Services, to sell and service residential alarm systems. In 2001, Alliance Security Network offered to buy the company. And, in January 2001, Masterguard and Alliance entered into a purchase agreement for the sale of Masterguard to Alliance. Pursuant to the original purchase agreement terms, the transaction would be a cash sale, by which Shonce and Walters would receive cash proceeds at the transaction closing. However, the parties later entered into an amended purchase agreement, by which Shonce and Walters would receive a subordinated promissory note instead of the simple cash sale. The [*2] promissory note required Alliance to make periodic payments to Shonce and Walters over a two-year period.

Notably, Masterguard claims that Nemes & Anderson reviewed the note and advised Masterguard to sign it, which Masterguard did, claiming not to know that the note was subordinated to that of another creditor. Nemes & Anderson, however, denies this allegation.

In September 2001, Masterguard and Alliance closed on the sale, and Alliance began making payments on the promissory note. However, in May 2002, Alliance stopped making payments. Masterguard then retained Nemes & Anderson to assist with enforcement of the promissory note. And, to that end, Masterguard, through Nemes & Anderson, filed a breach of contract suit against Alliance.

Following the filing of the complaint, Masterguard and Alliance entered settlement negotiations, which resulted in a June 2002 settlement agreement, by which they agreed to a modified payment schedule. Paragraph 7 of the settlement agreement stated that Alliance "shall use reasonable efforts to secure this Settlement Agreement with a pledge of its accounts second only to SLP for which [Alliance] shall execute a UCC-1 and Security Agreement in support thereof." [*3] Shonce expressed

concern about this provision, questioning why Masterguard would "leave it up to [Alliance] to file a UCC." However, despite his concerns, Shonce signed the agreement in July 2002.

Alliance complied with the payment schedule through August 2005, when it filed for Chapter 11 bankruptcy. In September 2005, Masterguard received notice that Alliance had listed it in the bankruptcy filings as an unsecured creditor. Masterguard was surprised at its unsecured status because it believed that it had a secured interest, based on the June 2002 settlement agreement. Accordingly, Masterguard retained Nemes & Anderson to seek reclassification of Masterguard as a secured creditor. But in July 2006, the bankruptcy court determined that Masterguard was an unsecured creditor.

As part of the bankruptcy proceeding, Alliance filed a counterclaim against Masterguard, asserting that Masterguard violated the parties' non-compete agreement. Masterguard and Alliance ultimately negotiated a settlement by which Masterguard agreed to an unsecured claim in the amount of $ 90,000 in exchange for Alliance's withdrawal of its non-compete claim. Accordingly, in January 2007, the bankruptcy court entered [*4] a stipulated order stating that Masterguard "shall have a general unsecured claim in the amount of $ 90,000.00[.]" And, pursuant to the approved reorganization plan, Masterguard received a right to a total payment of 30 percent of its claim, or approximately $ 30,000.

On July 26, 2007, Masterguard filed this legal malpractice claim against Nemes & Anderson, alleging that Nemes & Anderson failed to properly represent Masterguard regarding the June 2002 settlement agreement. More specifically, Masterguard took issue with the fact that paragraph 7 of the settlement agreement left it to Alliance to perfect the security interest between the parties, which ultimately led to Masterguard's status as an unsecured creditor. Nemes & Anderson moved for summary disposition under MCR 2.116(C)(7), arguing that Masterguard's complaint was time-barred because Masterguard filed it more than two years after Nemes & Anderson's representation of Masterguard ended in July 2002, when Masterguard executed the settlement agreement. Nemes & Anderson also moved for summary disposition under MCR 2.116(C)(10).

In its written opinion and order, the trial court explained that "[t]his malpractice action arises from [*5] a July 2002 Settlement Agreement entered into between [Masterguard] and Alliance . . . which restructured payments owed to [Masterguard] pursuant to a Subordinated Promissory Note." The trial court ruled that "the execution of the 2002 Settlement Agreement was the completion of legal services that [Nemes & Anderson] were retained by [Masterguard] to perform" and that, therefore, Masterguard's "claims for malpractice accrued in July of 2002 when that Settlement Agreement was executed." The trial court noted that Masterguard had "not argued that the 6 month discovery rule is applicable" and concluded that, "[p]ursuant to the 2 year statute of limitations for legal malpractice actions," Masterguard was required to file its complaint by July 2004. Accordingly, the trial court held that Masterguard's claims were time-barred and granted Nemes & Anderson summary disposition under MCR 2.116(C)(7). The trial court also held that, alternatively, summary disposition was appropriate under MCR 2.116(C)(10) because Masterguard failed to establish that Nemes & Anderson's conduct proximately caused it to suffer any damages as the result of being an unsecured creditor. Masterguard now appeals.

II. STATUTE [*6] OF LIMITATIONS

A. STANDARD OF REVIEW

Masterguard argues that the trial court erred in granting Nemes & Anderson's motion for summary disposition under MCR 2.116(C)(7) because its complaint was timely filed within two years of the date on which Nemes & Anderson discontinued its representation of Masterguard.

Under MCR 2.116(C)(7), a party may move for summary disposition on the ground that a statute of limitations bars a claim. Neither party is required to file supportive material; any documentation that is provided to the court, however, must be admissible evidence. [1] The plaintiff's well-pleaded factual allegations must be accepted as true and construed in the plaintiff's favor, unless contradicted by documentation submitted by the

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[1] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

movant. [2] Absent disputed issues of fact, we review de novo whether the cause of action is barred by a statute of limitations. [3]

B. LEGAL STANDARDS

Generally, no person may bring an action charging malpractice unless [*7] he commences the action within two years of when the claim accrued. [4] A legal malpractice claim "accrues at the time [the attorney] discontinues serving the [client] in a professional . . . capacity as to the matters out of which the claim for malpractice arose." [5] The fact that an attorney later represents the same client in a separate matter does not extend the period of limitations. [6] A lawyer discontinues service when the client or the court relieves him of the obligation, or when he completes the specific legal service that the client retained him to perform. [7]

C. APPLYING THE STANDARDS

In support of its argument that its legal malpractice complaint was timely, Masterguard argues that the accrual statute's use of the plural word "matters" [8] indicates the Legislature's intent that the alleged malpractice can arise out of multiple matters. And here, Masterguard contends that Nemes & Anderson continued to represent [*8] it during the bankruptcy proceeding. However, the fact that an attorney later represents the same client in a separate matter does not extend the period of limitations; that is, an attorney's consecutive representation of the same client in a different matter does not affect the original date of accrual. [9]

In *Balcom v Zambon*, the defendants represented the plaintiff in two different actions arising out of a bar brawl. [10] The attorneys first represented the plaintiff in a criminal proceeding and then later represented the plaintiff in a civil action. [11] The plaintiff then later brought a legal malpractice claim, alleging that the attorneys committed malpractice by (1) failing to obtain a valid written release of civil liability in the underlying criminal matter, and (2) failing to have the circuit court enter an order denying his motion for summary disposition in the civil case. [12] After noting that an attorney discontinues serving a client upon completion of a specific legal service that the attorney was retained to perform, this Court pointed out that, although the plaintiff's legal malpractice claim was filed within two [*9] years of the civil case arising out of a bar brawl, it was not filed within two years of the earlier criminal litigation. [13] Therefore, this Court held that the trial court erred in dismissing the plaintiffs' claim arising out the civil action, but that the trial court did not err in dismissing the plaintiff's claim arising out the criminal proceeding. [14]

Here, Masterguard retained Nemes & Anderson to file its breach of contract claim against Alliance in May 2002. That lawsuit ultimately resulted in the June 2002 settlement agreement, which was fully executed in July 2002. And in this legal malpractice action, Masterguard now claims that Nemes & Anderson failed to protect

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[2] MCR 2.116(G)(5); *Maiden*, 461 Mich at 119; *Gortney v Norfolk & W R Co*, 216 Mich App 535, 538-539; 549 NW2d 612 (1996).

[3] *Colbert v Conybeare Law Office*, 239 Mich App 608, 609 NW2d 208 (2000).

[4] MCL 600.5805(6); *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 571; 703 NW2d 115 (2005).

[5] MCL 600.5838(1); see also *Kloian v Schwartz*, 272 Mich App 232, 237; 725 NW2d 671 (2006).

[6] *Balcom v Zambon*, 254 Mich App 470, 484; 658 NW2d 156 (2002).

[7] *Id.*

[8] MCL 600.5838(1) (emphasis added).

[9] *Balcom*, 254 Mich App at 484.

[10] *Id.* at 472-475.

[11] *Id.*

[12] *Id.* at 475-476.

[13] *Id.* at 484.

[14] *Id.* at 484-485.

Masterguard's interests as a secured creditor in that settlement agreement. Thus, Masterguard's legal malpractice claim arises out of the settlement agreement, and Nemes & Anderson discontinued serving Masterguard *as to that matter* when Masterguard executed the settlement agreement in July 2002. [15] That is, Nemes & Anderson's representation of Masterguard in the breach of contract action ceased upon the conclusion of that action, which occurred when [*10] the parties executed the settlement agreement. [16] Masterguard's malpractice claim does not arise out of Nemes & Anderson's conduct during the bankruptcy proceeding, for which Masterguard again retained Nemes & Anderson after a three-year interruption in service. Thus, the fact that Masterguard retained Nemes & Anderson again in the subsequent, separate bankruptcy proceeding does not affect the date of accrual for the original malpractice. Therefore, Masterguard was required to file its legal malpractice complaint within two years of the July 2002 accrual, or no later than July 2004. It did not file its complaint until July 2007, therefore Masterguard's claim is time-barred under the general two-year statute of limitations.

We note that at oral argument Masterguard's counsel brought up, for the first time, the Michigan Supreme Court's decision in *Levy v Martin*, [17] in which the Court adopted JUDGE WHITBECK's dissent in the underlying Court of Appeals decision. [18] However, *Levy* [*11] is distinguishable from the present case. In *Levy*, the plaintiffs retained the defendant accountants to prepare their annual tax returns from 1974 to 1996. [19] Due to the accountants' improper preparation of the 1991 and 1992 tax returns, the IRS audited the plaintiffs and required them pay additional taxes and penalty charges. [20] The plaintiffs filed a malpractice claim against the accountants in 1997, which the trial court dismissed as untimely. [21] The Supreme Court held that the plaintiffs' claim did not accrue until at least 1996 because it was "clear" that the plaintiffs, "rather than receiving professional advice for a specific problem, were receiving generalized tax preparation services[.]" [22] However, here, unlike the plaintiffs in *Levy*, Masterguard did not receive generalized legal services from Nemes & Anderson; instead, Masterguard received legal advice from Nemes & Anderson for a specific legal problem--the breach of contract action, which ended in the settlement agreement.

Because [*12] our resolution of this statute of limitations issue is dispositive, we need not address Masterguard's remaining argument regarding the trial court's ruling granting Nemes & Anderson summary disposition under MCR 2.116(C)(10).

We affirm.

/s/ David H. Sawyer

/s/ Richard A. Bandstra

/s/ William C. Whitbeck

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[15] See MCL 600.5838(1); *Kloian*, 272 Mich App at 237.

[16] *Balcom*, 254 Mich App at 484 (stating that a lawyer discontinues service when he completes the *specific* legal service that the client retained him to perform).

[17] *Levy v Martin*, 463 Mich 478; 620 NW2d 292 (2001).

[18] *Levy v Martin*, unpublished opinion per curiam of the Court of Appeals, issued Sept. 17, 1999 (Docket No. 207797).

[19] *Levy*, 463 Mich at 481.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 486, 489.

EXHIBIT 5

Boss v. Loomis

Court of Appeals of Michigan

March 16, 2010, Decided

No. 287578 and 289438

Reporter
2010 Mich. App. LEXIS 504; 2010 WL 935642

JACK BOSS and MARI BOSS, Plaintiffs/Cross-Defendants/Appellants, v LOOMIS, EWERT, PARSLEY, DAVIS, & GOTTING, PC, KELLY K. REED, CATHERINE A. JACOBS, KEVIN J. RORAGEN, WILLIAM CULBERTSON, S. WHITFIELD LEE, R. ANDREW GATELY, Defendants-Appellees, and TALL GRASS INVESTMENT CORP, Defendant/Cross-Plaintiff/Appellee, and EAGLE TRANSPORT SERVICES, INC., Defendant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Leave to appeal denied by *Boss v. Loomis, 2010 Mich. LEXIS 1588 (Mich., July 26, 2010)*

Prior History: [*1] Allegan County Court. LC No. 05-037882-CK.

Core Terms

plaintiffs', trial court, frivolous, acquisition, sanctions, Levy, defamation claim, malpractice, attorneys, termination, services, invoice, matters, summary disposition, conflicting interest, legal services, defamation, legal malpractice claim, application for leave, discontinues, limitations, preparation, averred, billing, party's

Judges: Before: Meter, P.J., and Zahra and Donofrio, JJ.

Opinion

PER CURIAM.

In Docket No. 287578, plaintiffs Jack Boss and Mari Boss, [1] appeal a July 9, 2007 order granting the renewed motion for summary disposition of plaintiffs' legal malpractice claim brought by defendant law firm Loomis, Ewert, Parsley, Davis & Gotting, PC and by individual attorneys within the law firm, Kelly K. Reed, Catherine A. Jacobs, Kevin J. Roragen, ("the Loomis defendants"). The trial court granted summary disposition pursuant to *MCR 2.116(C)(7)* on the ground that plaintiffs' claim was barred by the two-year statute of limitations applicable to claims of professional malpractice as set out in *MCL 600.5805*. The matter at issue involved the appropriate accrual date as determined under *MCL 600.5838*. Because we are precluded from readdressing this argument by the law of the case doctrine, we affirm.

In Docket No. 289438, plaintiffs appeal a post-judgment order granting sanctions pursuant to *MCL 600.2591* to defendants Tall Grass Investment Corporation, [*2] William Culbertson, S. Whitfield Lee, and R. Andrew Gately, against plaintiffs, jointly and severally. Because plaintiffs have not sufficiently developed their arguments on appeal nor have they presented applicable legal authority for their arguments they have not established error, and we affirm.

I

This case arises out of the sale of 80% of defendant Eagle Transport Services, Inc. and related real estate from plaintiff Jack Boss, who retained the other 20%, to defendants Tall Grass Investment Corporation, Culbertson, Lee, and Gately. In the complaint, filed June 17, 2005, plaintiffs alleged a fraud claim against

[1] We were advised at oral argument that Mari Boss has been adjudged bankrupt and therefore, the appellee relinquish their claims against her.

those defendants, specifically alleging that they raided the assets of Eagle, and caused Eagle to withhold payments for company cars, credit cards, and other business assets that caused plaintiffs to be personally responsible for those payments, thus destroying plaintiffs' credit rating. With regard to the Loomis defendants, in a count alleging legal malpractice, plaintiffs alleged that the documents for the transfer drafted by the attorneys at defendant Loomis firm were insufficient and failed to protect plaintiffs from the acts of the Tall Grass defendants.

Defendant Loomis [*3] firm represented plaintiffs beginning in 1992 in various matters both personal and business-oriented. Defendant Jacobs provided estate-planning services to plaintiffs, which were completed in April 1999. From March 2001 to November 2001, the Loomis firm represented Eagle and Jack Boss in facilitating the termination of Michael Dargis, a minority shareholder in Eagle. Plaintiff Jack Boss and defendant Jacobs agree that the Dargis termination matter ended in November 2001. Neither of those matters is involved in this action.

Defendant attorneys Jacobs, Reed, and Roragen each averred that Eagle and plaintiffs retained defendant Loomis firm on July 25, 2002, to represent their interests in the sale of Eagle to Tall Grass, that Tall Grass acquired a majority of Eagle's shares on March 13, 2003, and that "[t]he last date Loomis performed legal services for Jack and Mari Boss related to the Tall Grass Acquisition was on April 7, 2003." Also, April 7, 2003, is the date of the last service rendered by defendant Loomis firm on the Tall Grass acquisition as reflected in the firm billing invoice. Defendant attorneys Jacobs, Reed, and Roragen each averred that the Loomis firm continued to represent [*4] Eagle after the acquisition by Tall Grass, but did not represent plaintiffs "individually on any matter related to the sale of their interest in Eagle."

Defendant Roragen averred that after the Tall Grass acquisition, defendant Culbertson asked him to continue as legal counsel for Eagle, and that Roragen told him he would, but if a conflict of interest arose with Jack Boss, he would be unable to represent either without a signed waiver of conflict. Defendant Roragen also averred that in 1999, plaintiffs had entered into a land contract for the purchase of a piece of property, and that around July 4, 2004, Eagle discovered that the property was listed as
one of its assets. Defendant Roragen stated that defendant Culbertson asked him to represent Eagle in the quiet title action relative to that property and that he contacted plaintiff Jack Boss to ask him to waive any conflict of interest if the Loomis firm agreed to represent Eagle in that action, and that Jack Boss refused to do so. [2]

Defendants Jacobs and Reed each averred that on September 16, 2003, Jack Boss asked the firm [*5] to represent his wife, plaintiff Mari Boss, after Eagle terminated her employment, and that they explained that they could not represent Mari without obtaining a conflict of interest waiver from Eagle.

The Loomis defendants all moved for summary disposition on the ground that under *MCL 600.5838*, a claim of professional malpractice accrues "at the time that person discontinues serving the plaintiff in a professional . . . capacity as to the matters out of which the claim for malpractice arose," and the matter out of which this claim arose -- the Tall Grass acquisition -- was completed on April 7, 2003. But plaintiffs did not file their complaint until June 17, 2005, beyond the two-year limitations period set out in *MCL 600.5805(5)*.

In response to the Loomis defendants' motion for summary disposition, plaintiffs did not argue that representation on the Tall Grass acquisition continued beyond April 7, 2003. Instead, they argued that they had relied on the Loomis defendants for all their legal needs for many years and that the representation did not cease with the finalization of the Eagle/Tall Grass matter. Plaintiffs further argued that defendant Loomis firm continued to represent them [*6] on many other items, some related to Eagle, some not. Plaintiffs relied on an invoice from the Loomis firm to plaintiff Jack Boss for "Legal Services Rendered Through September 30, 2003." That invoice lists services for three dates. The first service was for September 3, 2003, and is described as follows: "Review file for creation of new LLC, forward LLC operating agreements and ancillary documentation to be signed by client as prepared by Catherine Jacobs in 2001." The second service date on the invoice is for September 8, 2003, which is described as, "Telephone conference with Kevin J. Roragen regarding Tall Grass' agreement to waive conflict of interest in MSA, LLC negotiation with Eagle." And the third service date is for September 16, 2003, and it is described as, "Telephone conference with Jack Boss regarding Mari being fired

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[2] See *Dargis v Boss*, Unpublished opinion of the Court of Appeals, issued September 16, 2008 (Docket No. 273473).

by Eagle; telephone conference with Jack Boss and Catherine A. Jacobs regarding ethical prohibition for Loomis to represent Mari with respect to her termination at Eagle without Eagle's waiver of the conflict of interest."

During oral argument on the summary disposition motion, plaintiffs argued that the Loomis defendants had not discontinued serving them [*7] as clients and invoked the "last treatment rule." In an apparent effort to clarify plaintiffs' argument, the trial court posited a scenario to plaintiffs' attorney:

> Let's say a lawyer represents a client over a twenty year period in various matters. During the early part of the representation, the lawyer gives the client bad advice regarding one matter. Would the client still have a malpractice claim years later if the lawyer was still representing the client, but in a completely different matter?

Plaintiffs' attorney responded in the affirmative.

Ultimately the trial court granted the Loomis defendants' renewed motion for summary disposition with prejudice holding that:

> Here, the court takes note of Mr. Roragen's affidavit, which shows that he asked Mr. Boss for a waiver, but finds that there was no duty for the Defendants to send a letter terminating representation. Plaintiffs' legal malpractice claims arise out of the Tall Grass Acquisition matter and the last September billing regarding Mari Boss had nothing to do with this malpractice claim. The Court finds the Defendants discontinued serving Plaintiffs in the Tall Grass Acquisition matter in April 2003. Plaintiffs' legal malpractice [*8] claims are barred pursuant to the statute of limitations.

The trial court dismissed defendant law firm Loomis, Ewert, Parsley, Davis & Gotting, PC and defendant individual attorneys Reed, Jacobs, and Roragen for the reason that plaintiffs' claims were barred by the statute of limitations pursuant to MCR 2.116(C)(7). Plaintiffs sought delayed leave to appeal the trial court's ruling in this Court. This Court denied plaintiffs' delayed application for leave to appeal "for lack of merit in the grounds presented." *Boss v Loomis, Ewert, Parsley, Davis & Gotting, PC*, Unpublished order of the Court of Appeals, entered February 4, 2008 (Docket No. 280716). [3]

The matter proceeded against the remaining defendants. Defendant Eagle Transport apparently did not file an appearance in the matter because it was then defunct. [*9] Plaintiffs submitted a proposed default judgment against defendant Eagle Transport in the amount of $ 605,899.39. The trial court entered the default judgment on October 11, 2006. With regard to the remaining defendants, case evaluation was held in May 2007. Plaintiffs were awarded $ 125,000. The remaining defendants, Tall Grass, Culbertson, Lee, and Gately all filed an acceptance of the award. Plaintiffs rejected the case evaluation.

Jury trial commenced on May 5, 2008 and continued through May 16, 2008. The jury found no cause of action regarding any of plaintiffs' claims against the remaining defendants. The jury did, however, award a judgment in the amount of $ 64,114.54 in favor of defendant Tall Grass Investment Corp. against plaintiffs jointly and severally. The trial court entered a final judgment in accordance with the jury verdict on August 14, 2008. With regard to case evaluation sanctions, on November 7, 2008, the trial court entered a stipulated order granting defendants, Tall Grass, Culbertson, Lee, and Gately, case evaluation sanctions in the amount of $ 133,275 in actual attorneys' fees against plaintiffs jointly and severally. The trial court also entered an Order for [*10] Sanctions pursuant to MCL 600.2591 on November 26, 2008 awarding defendants, Tall Grass, Culbertson, Lee, and Gately, $ 23,759 in sanctions against plaintiffs jointly and severally after finding that plaintiffs' defamation claim was frivolous. Plaintiffs now appeal as of right.

II

First, in Docket No. 287578, plaintiffs argue again on appeal that the trial court erred when it determined that the statute of limitations had run with regard to defendants Loomis, Ewert, Parsley, Davis & Gotting,

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[3] Plaintiffs filed an application for leave to appeal the Court of Appeals' order in the Supreme Court. Our Supreme Court denied plaintiffs' application for leave to appeal because it was "not persuaded that the question presented should be reviewed by this Court." *Boss v Loomis, Ewert, Parsley, Davis & Gotting, PC*, Order of the Supreme Court, entered May 27, 2008 (Docket No. 136038).

PC and by individual attorneys within the law firm, Reed, Jacobs, and Roragen. Plaintiffs previously sought delayed leave to appeal the trial court's ruling regarding the statute of limitations in this Court immediately following the trial court's grant of summary disposition against the Loomis defendants in Docket No. 280716. At that time, this Court denied plaintiffs' delayed application for leave to appeal "for lack of merit in the grounds presented." *Boss v Loomis, Ewert, Parsley, Davis & Gotting, PC*, Unpublished order of the Court of Appeals, entered February 4, 2008 (Docket No. 280716). "Under the law of the case doctrine, an appellate court ruling on a particular issue binds the appellate [*11] court and all lower tribunals with regard to that issue." *Webb v Smith (After Second Remand), 224 Mich App 203, 209; 568 NW2d 378 (1997)*. Because this Court expressed an opinion on the merits of plaintiffs' arguments in denying the application for leave to appeal in Docket No. 280716, the law of the case doctrine precludes us from readdressing the arguments.

Were we to address the merits of the argument, we would find no merit to plaintiffs' argument on this issue. A legal malpractice claim must be brought within two years of the date the claim accrues, or within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. *MCL 600.5805(6)*; *MCL 600.5838*. In *Kloian v Schwartz, 272 Mich App 232; 725 NW2d 671 (2006)*, this Court stated the two year limitations period and that accrual is at the time the attorney discontinues serving the plaintiff "as to the matters out of which the claim for malpractice arose." *Id., 237*. The *Kloian* Court also quoted *Gebhardt v O'Rourke, 444 Mich 535, 543; 510 NW2d 900 (1994)*, for the proposition that "a legal malpractice claim accrues on the attorney's 'last day of professional service' in the matter out [*12] of which the claim for malpractice arose." *Kloian, supra at 232*, quoting *Gebhardt, supra at 543*. Moreover, the *Kloian* Court went on to explain,

> [W]hen an attorney is not dismissed by the court or the client, and substitute counsel is not retained, the attorney's service discontinues "upon completion of a specific legal service that the lawyer was retained to perform." [*Id.* (internal citations omitted).]

Plaintiffs here relied on the invoice captioned "Legal Services Rendered Through September 30, 2003." "The matter out of which the claim for malpractice arose," or put another way, "the specific legal service that the lawyer was retained to perform" was the acquisition of Eagle Transport by Tall Grass. None of the three services described in the invoice had anything to do with that transaction. The one for September 3, 2003, relates to the separate matter of the formation of a limited liability company. The second one dated September 8, 2003, relates to a telephone conference in which Tall Grass's conflict of interest waiver is sought in regard to a negotiation with Eagle regarding an entity called MSA, LLC. Although Tall Grass is involved in the conference call, its acquisition of Eagle [*13] Transport is not at issue in any way. And finally, the third dated September 16, 2003, is a conference call regarding possible representation of Mari Boss after Eagle Transport terminated her employment. That too does not involve the Tall Grass acquisition.

Again on appeal, plaintiffs rely on the "last treatment rule" discussed in *Levy v Martin, 463 Mich 478; 620 NW2d 292 (2001)*, and argue that it applies in the present case. In *Levy*, our Supreme Court considered a malpractice action against an accountant who prepared annual tax returns for the plaintiff. In that case, as the result of an IRS audit of 1991 and 1992 tax years, the plaintiff was required to pay additional taxes as well as interest and other legal and accounting expenses. The plaintiff brought a malpractice suit against the defendant accountants in 1997. *Id. at 480-481*. The *Levy* Court began its analysis by reviewing the application of "the last treatment rule" in *Morgan v Taylor, 434 Mich 180; 451 NW2d 852 (1990)*, involving a malpractice claim in connection with a 1981 optometric examination. The plaintiff in *Morgan* had an examination less than two years earlier and the *Levy* Court said, "the issue in *Morgan* was whether [*14] 'routine, periodic examinations' extend the limitation period." *Id., 483*. In *Morgan*, the Court stated that the "last treatment rule" applied in the context of routine, periodic examinations, holding that:

> It is the doctor's assurance upon completion of the periodic examination that the patient is in good health which induces the patient to take no further action other than scheduling the next periodic examination.
>
> Particularly in light of the contractual arrangement which bound defendant and entitled plaintiff to periodic eye examinations, it cannot be said that the relationship between plaintiff and defendant terminated after each visit. [*Levy, supra at 483-484* quoting *Morgan, supra at 194* (internal footnotes omitted).]

Turning to the facts in its case, the *Levy* Court adopted as its own, Judge Whitbeck's dissenting opinion in *Levy* that the "last treatment rule" applies in the context of routine and periodic services such as individual tax preparations. In that opinion as quoted in *Levy*, Judge Whitbeck wrote,

> A patient who attended a periodic examination and was not diagnosed with any medical problem was under the rationale of the last treatment rule provided with an "assurance" of good [*15] health that induced the patient to take no further action to investigate the pertinent health matters until the next periodic examination. Likewise, a client who entrusts preparation of annual tax returns to an accountant is provided with an assurance of professional preparation of the tax returns that induces the client to take no further action regarding those matters until it is time to prepare the next year's tax returns. [*Levy, supra at 485*.]

The "last treatment rule" thus applies in the context of routine and periodic services such as individual tax preparations. However, none of the services provided by the Loomis defendants to plaintiffs in September 2003 fall into that category. Instead, they involve separate, disparate matters wholly distinct from the legal services performed by the Loomis defendants for plaintiffs related to the Tall Grass acquisition that was completed on April 7, 2003. For these reasons the "last treatment rule" is inapplicable and, were we to address plaintiffs' argument on this issue, we would conclude that it is without merit.

III

In Docket No. 289438, plaintiffs first argue that the trial court clearly erred in determining that their defamation claim [*16] in their complaint was frivolous. Whether a claim is frivolous depends on the facts of the case and review of a trial court's finding of frivolity is for clear error. *Kitchen v Kitchen, 465 Mich 654, 661-662; 641 NW2d 245 (2002)*. *MCL 600.2591* provides that costs and fees shall be awarded if a court finds that a party's claim or defense was frivolous. Frivolous is defined in *MCL 600.2591(3)(a)* as one or more of the following:

> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit. [*MCL 600.2591(3)(a)*.]

Likewise, *MCR 2.114(E)* and *MCR 2.625(A)(2)* mandate an award of costs and fees on a finding of a frivolous claim. The sanctions may be levied against the attorney, the represented party, or both. *MCR 2.114(E)*.

Here, plaintiffs voluntarily dismissed their defamation claim at the beginning of trial before any proofs went to the jury. In a post-trial motion, defendants Tall Grass, Culbertson, Lee, and Gately filed a motion [*17] for sanctions pursuant to *MCL 600.2591* against plaintiffs on three counts of their seven-count complaint. The trial court denied the motion on the quantum meruit/unjust enrichment count and the tortious interference with business relationship count, but granted it with regard to the defamation count. The trial court stated as follows at the November 7, 2008 hearing on the matter:

> The defamation issue is different. First of all I didn't hear anything at all that would even come close to defamation. It was dismissed before we went to trial, or actually not before we went to trial but before we started submitting proofs.
>
> So, I think at best that the petitioners here would be entitled--and I think because of that meeting the criteria, and based on what the Court recalls the testimony was during the course of the trial, that there was absolutely nothing that would support that and never was, and there never was at any time. That there wasn't a good basis to proceed on a claim such as that.
>
> I would, since I understand the difficulty in attempting to break down in a multi-count suit, I'm going to just divide it equally and since there were 5 claims against these petitioner[s], award attorney [*18] fees on the basis of frivolous claims under the Statute of one-fifth of the total at the adjusted attorney fee rate.

The trial court then issued an order on November 26, 2008 granting sanctions pursuant to *MCL 600.2591* in the amount of $ 23, 759 against plaintiffs to defendants Tall Grass, Culbertson, Lee, and Gately.

Plaintiffs present two arguments on appeal in support of their assertion that the trial court clearly erred when it

determined that their defamation claim was frivolous. First, plaintiffs seem to contend that when the case went to case evaluation, the case evaluators did not find any portion of plaintiffs' claims to be frivolous, so the trial court should not have found the defamation claim to be frivolous. And secondly, plaintiffs seem to be arguing that because the trial court allowed some portion of their complaint to go to the jury, then the entire case, including the defamation claim, could not have been frivolous. Though, plaintiffs barely articulate their arguments well enough for us to understand what they are arguing. And plaintiffs provide absolutely no support for their arguments. A party may not merely announce his position and leave it to this Court to unravel [*19] and elaborate for him his arguments and search for authority to support or reject his position. *Wilson v Taylor, 457 Mich 232, 243; 577 NW2d 100 (1998)*. We decline to address this argument due to plaintiffs' cursory treatment of the arguments. *Silver Creek Twp v Corso, 246 Mich App 94, 99; 631 NW2d 346 (2001)*.

However, we do observe that the absence of factual support for plaintiffs' allegations support the conclusion that the defamation claim was frivolous pursuant to *MCL 600.2591(3)(a)(iii)*. A suit for defamation must allege:

> 1) a false and defamatory statement concerning the plaintiff, 2) an unprivileged communication to a third party, 3) fault amounting to at least negligence on the part of the publisher, and 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication. [*Rouch v Evening News, 440 Mich 238, 251; 487 NW2d 205 (1992)*.]

And, claims for defamation must be pleaded with specificity. *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc, 197 Mich App 48, 52; 495 NW2d 391 (1992)*. A plaintiff must allege and identify specifically which statements he considers to be materially false. *Id. at 52-53*. With regard to their [*20] defamation claim, plaintiffs' complaint simply states, "[d]efendants [Lee], Culbertson, and Gately maliciously defamed the character of Plaintiffs by making untrue accusations of embezzlement against Plaintiffs to employees of Defendant Eagle and others after the termination of Plaintiffs' employment." The complaint does not identify specific statements, which defendants specifically made what statements, the content of the statements, and to whom the statements were directed. It is not enough

that a plaintiff allege all the necessary elements. The complaint must be "well grounded in fact" and filed only after "reasonable inquiry." *MCR 2.114(D)(2)*. In sum, were we able to review this argument fully, we would conclude that, based on the record presented, the trial court did not clearly err in finding plaintiffs' defamation claim frivolous because it was "devoid of arguable legal merit." *MCL 600.2591(3)(a)(iii)*.

IV

Finally, in Docket No. 289438, plaintiffs set forth this question in their statement of questions presented:

> Did the Trial Court err in not allowing Plaintiffs/Appellants an offset of the Eagle judgment amount of $ 605,899.39 against the legal fee sanctions claim of $ 28,766.80 [*21] since the legal fee invoices were submitted to Eagle Transport Services, Inc.?

With regard to plaintiffs setoff request in the trial court at a hearing on October 3, 2008, the trial court held as follows:

> That's neither here nor there. He was sued individually. I don't want to mince words. Lets not play any games. I understand who everybody is, I heard 2 weeks of trial. I understand that and as far as I'm concerned it's clear from those billings, Wardrop and McQueen's, that they were for this lawsuit and for the defense and the prosecution of the claims of Culberston, Whitfield Lee and Gately. The Court makes that determination.
>
> To hold otherwise would be putting a strained interpretation on what was billed out and for why. Eagle wasn't even part of the lawsuit at the time that these billings occurred. So that's what the Court is holding. If Mr. Boss and Mrs. Boss disagree with it they certainly can have the Court of Appeals take a second look.
>
> So, you may enter an order that says you're entitled to the sanctions provided for as you requested, but the amount at this time is reserved for an evidentiary hearing as to the appropriateness of attorney fees only.

On the sixth and final page of [*22] their brief on appeal, plaintiffs' entire argument with regard to this issue is as follows:

EXHIBIT 6

Charfoos v. Schultz

Court of Appeals of Michigan

November 5, 2009, Decided

No. 283155

Reporter
2009 Mich. App. LEXIS 2313; 2009 WL 3683314

RONALD B. CHARFOOS and CAROL CHARFOOS TATOR, Plaintiffs-Appellants, v JACK M. SCHULTZ, Defendant-Appellee.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Oakland Circuit Court. LC No. 2007-084125-NM.

Core Terms

malpractice, documents, drafting, trial court, cause of action, the will, summary disposition, plaintiffs', decedent's, testator's, testamentary document, intended beneficiary, limitations period, legal malpractice, legal services, competence, accrues

Judges: Before: Wilder, P.J., and Meter and Fort Hood, JJ.

Opinion

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition to defendant. We affirm.

This case arises out of the estate of Herbert Charfoos (Herb). Herb died on July 6, 2005, of "multi-infarct dementia." Plaintiffs are Herb's children. Defendant was Herb's attorney and drafted his 2004 will and amendment to his revocable trust agreement. The effect of the 2004 changes was to disinherit plaintiffs of 70 percent of Herb's estate by giving it to his new wife.

Plaintiffs first argue on appeal that the trial court erred when it concluded that plaintiffs were barred from presenting evidence extrinsic to Herb's testamentary documents in order to prove legal malpractice. Plaintiffs contend that defendant had actual knowledge of Herb's mental incompetence at the time the documents were drafted. On appeal, the trial court's decision to grant or deny summary disposition is reviewed de novo. *Kuznar v Raksha Corp, 481 Mich 169, 175; 750 NW2d 121 (2008)*. In reviewing a motion for summary disposition under *MCR 2.116(C)(8)*, this Court considers the pleadings alone and [*2] accepts the factual allegations of the complaint as true. *Id. at 176*. Summary disposition is proper if the plaintiff's claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* (internal quotations omitted).

The Supreme Court declared, in *Mieras v DeBona, 452 Mich 278, 299; 550 NW2d 202 (1996)*, that the intended beneficiaries of a will are owed a tort-based duty, as third-party beneficiaries of the contractual relationship between the testator and the attorney contracted to draft the will, by the attorney to draft the document with the "requisite standard of care." The duty is limited to an obligation to fulfill the intent of the testator as expressed in the will. *Id. at 301*. This limitation requires that a party alleging legal malpractice by the drafting attorney is prohibited from using "extrinsic evidence to prove that the testator's intent is other than that set forth in the will." *Id. at 303*. Further, this prohibition is extended to evidence surrounding the drafting of other testamentary documents -- including trust documents, as in this case. *Bullis v Downes, 240 Mich App 462, 468; 612 NW2d 435 (2000)* (no distinction [*3] made among varieties of modern estate planning tools).

Here, the trial court prohibited plaintiffs from presenting evidence of Herb's mental competence, and defendant's knowledge thereof, before Herb's execution of his last testamentary documents. Without this evidence, plaintiffs were left with nothing with which to prove their claim.

Plaintiffs acknowledge the rule of *Mieras* but argue that this case differs from the prototypical *Mieras* case because they are arguing that defendant's conduct merely of drafting the testamentary documents, with knowledge of Herb's incapacity, constitutes malpractice. They argue that they do not need to introduce extrinsic evidence regarding the actual content of the documents to demonstrate malpractice. Therefore, they argue that there should be an exception to the rule in *Mieras* if intended beneficiaries seek to use evidence extrinsic to the testamentary documents to demonstrate that an attorney had actual knowledge of a testator's or settlor's incapacity at the time the documents were drafted.

The facts of this case do differ from the facts of *Mieras*. The intended beneficiaries in that case argued that the failure of the decedent's will to provide for [*4] a power of appointment was evidence of legal malpractice because it was the decedent's intent to exercise the power. *Mieras, supra at 281*. However, because the will contained no reference to the power of appointment, there was nothing intrinsic to the will that indicated a failure of the will to express the decedent's intent. *Id. at 293, 308*. In this case, plaintiffs contend that there could never be any indication of malpractice on the face of the documents because the malpractice occurred as a predicate to drafting the documents. The Court in Mieras declared that intended beneficiaries should have the opportunity to challenge the actions of the drafting attorney because the personal representative of the decedent's estate would lack incentive to pursue such an action herself. *Mieras, supra at 290*. However, such challenges are limited in terms of permissible evidence because, otherwise, the danger of misinterpreting the decedent's intent in his absence, or of creating an incentive for intended beneficiaries to fabricate evidence, is too high. *See id. at 304-305*. Thus, despite the factual differences, the policy objectives in *Mieras* are mirrored in this case. Because Herb is deceased, [*5] the question of his competency at the time the documents were executed must be resolved in his absence. Further, there is a similar incentive on the part of disgruntled beneficiaries to fabricate evidence regarding the decedent's competency. Finally, at its heart, this remains a case about the intent of the decedent. Plaintiffs' claim is structured as a question of Herb's competence and defendant's knowledge of Herb's competence, but their alleged damages would be dependent on the fact that defendant's alleged error thwarted Herb's intent, of which there is no intrinsic evidence.

Again, *Mieras* limits the standing of intended beneficiaries to sue for legal malpractice where there is no evidence in the testamentary documents indicating that the testator's or settlor's intent may not have been expressed. *Mieras, supra at 308*. The Court cited the following statement from a Florida case: "'We adhere to the rule that standing in legal malpractice actions is limited to those who can show that the testator's intent *as expressed in the will* is frustrated by the negligence of the testator's attorney.'" *Id. at 305*, quoting *Espinosa v Sparber, 612 So 2d 1378 (Fla, 1993)* (emphasis in original). [*6] We conclude that the Court in Mieras anticipated the instant factual circumstances and the trial court did not err in concluding that the rule in *Mieras* is applicable to this case.

Plaintiffs next argue that defendant was negligent for failing to adhere to Michigan Rule of Professional Conduct (MRPC) 1.14(b). *MRPC 1.14* provides: "A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest." However, defendant correctly notes that *MRPC 1.0* states:

> Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules do not, however, give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule.

Thus, regardless of whether defendant violated *MRPC 1.14(b)*, the violation would not give rise to a legal malpractice action. Cf. *Evans & Luptak v Lizza, 251 Mich App 187, 192-193; 650 NW2d 364 (2002)* (MRPC may provide evidence of ethical standards for lawyers but does not give rise to an independent [*7] cause of action). Plaintiffs contend that this alleged rule violation could be *evidence in support of* a malpractice claim. However, there is simply no valid malpractice claim here to which to apply this "evidence."

Plaintiffs also argue that the trial court erred when it concluded that plaintiffs' claim was barred by the applicable statute of limitations. In reviewing a motion for summary disposition under *MCR 2.116(C)(7)*, this Court accepts the plaintiff's well-pleaded allegations as true unless affidavits or other documents specifically contradict them. *Kuznar, supra at 175-176*. Further, this Court reviews all the evidence presented to the trial

court and if the evidence demonstrates that one party is entitled to judgment as a matter of law, or that there is no genuine issue of material fact regarding the running of the period of limitations, summary disposition is appropriate. *See* id. at 175. Additionally, questions of statutory interpretation are reviewed de novo. *Id. at 176*.

Plaintiffs contend that the limitations period on their claim did not begin to run until defendant's legal relationship with Herb ended upon Herb's death on July 6, 2005, because defendant continued to provide [*8] services for Herb until his death. Specifically, plaintiffs argue that defendant continued to provide estate-related legal services to Herb until the time of his death. Defendant counters that the services from which the instant claims arose were completed when the documents in question were executed, in May 2004.

This Court's primary goal when considering statutory language is to give effect to the intent of the Legislature. *Alvan Motor v Dep't of Treasury, 281 Mich App 35, 39; 761 NW2d 269 (2008)*. If the statutory language is unambiguous, no judicial construction is required and the plain meaning of the language must be applied. *Id.*

MCL 600.5838 governs the time for bringing a claim for legal malpractice:

> [A] claim . . . accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. [See also *Kloian v Schwartz, 272 Mich App 232, 237; 725 NW2d 671 (2006)*.]

Further, a legal malpractice claim must be brought within two years of the date the claim accrues, or within six months after the [*9] existence of the claim is discovered. *MCL 600.5805(6)*; *MCL 600.5838(2)*. It is the two-year period that is in dispute in this case.

In an ongoing attorney-client relationship, courts have generally found that a claim accrues when the attorney is relieved of his obligations by the client or a court. *Kloian, supra at 237*. However, this rule may be limited by the qualification of MCL 500.5838 that the relevant professional relationship is that "out of which the claim for malpractice arose," depending on the factual circumstances. *Id. at 237-238*. For instance, where the attorney is retained for a discrete legal service, any claim arising from that service accrues upon its completion. *Id. at 238*.

The claim in this case arose out of the drafting of the amendments to Herb's trust agreement and will. The documents were executed on May 14, 2004. Taking plaintiffs' allegations as true, defendant continued to provide additional legal services to Herb after this date, up to the date of Herb's death on July 6, 2005. Plaintiffs erroneously treat the attorney-client relationship between defendant and Herb as analogous to a case of ongoing representation, such as during litigation. See, e.g., *Gebhardt v O'Rourke, 444 Mich 535, 541, 543-544; 510 NW2d 900 (1994)* [*10] (accrual when criminal representation terminated). In this case, however, defendant provided a series of discrete legal services for Herb -- drafting a prenuptial agreement, estate planning documents, etc. Moreover, plaintiffs' claim arose out of only one specific legal service provided by defendant and not, as they claim, from an ongoing relationship of estate planning services. Thus, the trial court did not err when it granted summary disposition to defendant on the ground that plaintiffs' claim was barred by the statute of limitations.

Plaintiffs also argue that the running of the limitations period was tolled for one year following Herb's death because of his mental disability. Regardless of Herb's capacity, plaintiffs misapprehend the disability rules for statutes of limitations. *MCL 600.5851(1)*, cited by plaintiffs, provides:

> [I]f the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run.

Plaintiffs [*11] erroneously read this statute to mean that the claim may be brought for one additional year after the period of limitations runs. Instead, a plain reading of the statute provides that Herb's estate would have one year following *his death* to bring an action for legal malpractice, even if the period of limitations had run at that point. Plaintiffs brought their complaint on July 3, 2007, almost two years after Herb's death. This argument is meritless.

Plaintiffs finally argue that the trial court erred when it denied their motion to amend the complaint to add a

count of intentional interference with a right of inheritance. This Court reviews a trial court's denial of a plaintiff's motion to amend her complaint for an abuse of discretion. Dorman v Clinton Township, 269 Mich App 638, 654; 714 NW2d 350 (2006).

The trial court denied plaintiffs' motion because it concluded that Michigan courts do not recognize a cause of action for intentional interference with a right of inheritance. On appeal, the parties cite competing unpublished opinions of this Court for their respective positions on this issue. In *In re Green*, unpublished opinion per curiam of the Court of Appeals, issued August 16, [*12] 1996 (Docket No. 173335), slip op, p 2, a panel of this Court stated:

> We expressly recognize this tort and join the numerous jurisdictions which have defined its elements as: (1) the existence of an expectancy; (2) intentional interference with that expectancy; (3) the interference involved conduct tortious in itself such as fraud, duress or undue influence; (4) a reasonable certainty that the devise to the plaintiff would have been received had the defendants not interfered; and (5) damages.

In a later case, another panel of this Court responded directly to *Green*:

> While the *Green* decision is well reasoned and persuasive, it is not binding precedent, MCR 7.215(C)(1). Furthermore, as thought provoking as [plaintiff's] argument may be, judicial restraint causes us to refrain from specifically recognizing this tort until the Michigan Legislature codifies this tort, or upon appropriate judicial review and expression of our Supreme Court. [*Dickshott v Angelocci*, unpublished opinion per curiam of the Court of Appeals, issued June 17, 2004 (Docket No. 241722), slip op, p 18.]

Neither of these unpublished opinions is binding on this Court. MCR 7.215(C)(1). Thus, because we find no published case [*13] law or statutory provision for plaintiffs' proposed cause of action, we conclude that Michigan courts have not yet recognized intentional interference with an expected inheritance as a valid cause of action in this state. See, e.g., Livonia Bldg Materials Co v Harrison Constr Co, 276 Mich App 514, 520; 742 NW2d 140 (2007) (looking to statute instead of to a nonbinding case); Ensink v Mecosta County Gen Hosp, 262 Mich App 518, 531 n 9; 687 NW2d 143 (2004) (Legislature creates cause of action); and Reeves v Kmart Corp, 229 Mich App 466, 474-476; 582 NW2d 841 (1998) (examining jurisprudence for recognition of a cause of action).

A trial court abuses its discretion when its decision falls outside the range of principled outcomes. See Taylor v Mobley, 279 Mich App 309, 315; 760 NW2d 234 (2008). The trial court's conclusion did not fall outside the range of principled outcomes because there is no binding authority recognizing the cause of action plaintiff sought to add.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Patrick M. Meter

/s/ Karen M. Fort Hood

EXHIBIT 7

Gould v. Huck

Court of Appeals of Michigan

September 9, 2008, Decided

No. 279538

Reporter
2008 Mich. App. LEXIS 1879

BERNICE M. GOULD, Plaintiff-Appellant, v THOMAS B. HUCK, P.C., Defendant-Appellee.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Iosco Circuit Court. LC No. 06-003053-NM.

Core Terms

malpractice, malpractice claim, services, statute of limitations, probate, testamentary document, summary disposition, two year

Judges: Before: Donofrio, P.J., and Murphy and Fitzgerald, JJ.

Opinion

PER CURIAM.

In this legal malpractice action, plaintiff, Bernice M. Gould, appeals as of right from the trial court's order granting summary disposition in favor of defendant, Thomas B. Huck, P.C. Because plaintiff did not bring her cause of action within two years of defendant's last service or within six months of her learning of a possible cause of action for malpractice, the trial court properly concluded that plaintiff's malpractice claim was time-barred, and we affirm.

I. Facts

Plaintiff and her late husband, Robert Gould, married in 1984. In 1999, the couple retained defendant to engage in estate planning services. After meeting with the Goulds, defendant prepared a joint trust agreement for the couple as well as individual wills for both plaintiff and her husband. The Goulds executed the joint trust agreement and their respective wills on July 19, 1999. The Goulds paid defendant $ 753 for professional services rendered and did not contact defendant for further services regarding the joint trust agreement or wills. Robert Gould died on February 10, 2004. Following Robert Gould's death, [*2] litigation ensued in probate court between plaintiff and Robert Peppler, Robert Gould's son-in-law, who had both been named trustees of the Goulds' joint trust. On July 1, 2004 Peppler's attorney requested that defendant provide an affidavit regarding the joint trust. Defendant provided the affidavit as requested on July 13, 2004. Further, as part of that probate matter, plaintiff's attorney deposed defendant on July 28, 2004 regarding whether he drafted the testamentary documents at issue, the Goulds' decision to execute a joint trust rather than separate trusts, the features of the joint trust, and supposed inconsistencies in the testamentary documents.

Plaintiff commenced the instant action again defendant on March 13, 2006 alleging legal malpractice. Defendant answered denying liability for the reason that the claim was barred by the applicable statute of limitations. Defendant then filed a motion for summary disposition pursuant to MCR 2.116(c)(7) and MCR 2.116(c)(10). After entertaining oral argument on the matter, the trial court granted defendant's motion for summary disposition and entered an order of dismissal.

II. Standard of Review

We review de novo a motion for summary disposition [*3] pursuant to MCR 2.116(C)(7). Trentadue v Buckler Lawn Sprinkler, 479 Mich 378, 386; 738 NW2d 664 (2007). In the absence of disputed facts, this Court also reviews de novo issues regarding whether a cause of action is barred by the applicable statute of limitations.

Id. Summary disposition is appropriate under MCR 2.116(C)(10) if no material factual dispute exists and the moving party is entitled to judgment as a matter of law. *Rice v Auto Club Ins Ass'n, 252 Mich App 25, 31; 651 NW2d 188 (2002)*. In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id. at 30-31*.

III. Analysis

"A legal malpractice claim must be brought within two years of the date the claim accrues, or within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." *Kloian v Schwartz, 272 Mich App 232, 237; 725 NW2d 671 (2006)*. *MCL 600.5805(6)* provides that "[e]xcept as provided in this chapter, the period of limitations is 2 years for an action charging malpractice." And, *MCL 600.5838(2)* provides that "[e]xcept as otherwise provided in section [*4] 5838a, an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." *MCL 600.5838(1)* is a codification of the common law "last treatment rule." *Levy v Martin, 463 Mich 478, 482-484, 490; 620 NW2d 292 (2001)*. It provides:

> Except as otherwise provided in section 5838a, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional . . . capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. [*MCL 600.5838(1)*.]

A. *MCL 600.5805(6)*

Plaintiff asserts that defendant's representation was not limited to the drafting of the testamentary documents in 1999 because defendant's last date of professional service was actually July 13, 2004 when he provided his affidavit regarding his professional services rendered. Defendant counters that [*5] plaintiff had two years from July 19, 1999 to timely file suit pursuant to *MCL 600.5805(6)*, and since she delayed until March 13, 2006 she has missed the deadline by several years. Defendant further argues that the July 13, 2004 affidavit was in no way a furtherance of the 1999 attorney-client relationship between the parties because defendant prepared the affidavit at the request of Peppler's attorney in the probate matter, not plaintiff or her attorney.

An attorney discontinues serving a client when he "is relieved of that obligation by the client or the court[,]" or "upon completion of the specific legal service that the lawyer was retained to perform." *Kloian, supra at 237-238*; see also *Maddox v Burlingame, 205 Mich App 446, 450; 517 NW2d 816 (1994)*. Thus, "a plaintiff's legal malpractice claim accrues on the day that the attorney last provides professional service in the specific matter out of which the malpractice claim arose." *Id.*, citing *Gebhardt v O'Rourke, 444 Mich 535, 543; 510 NW2d 900 (1994)*. "In general, once an attorney has discontinued serving the plaintiff-client, additional acts by the attorney will not delay or postpone the accrual of a legal malpractice claim." *Id. at 238 n 2*. [*6] In other words, follow-up and incidental activities do not serve to extend an otherwise terminated attorney-client relationship. See *Bauer v Ferriby & Houston, PC, 235 Mich App 536, 539; 599 NW2d 493 (1999)*.

After reviewing the record, we conclude that the attorney-client relationship in this case terminated on July 19, 1999 when the Goulds executed the joint trust and their wills. The record is clear that defendant completed all estate planning services he was hired to complete prior to that July 19, 1999 and the Goulds did not contact him for further services related to those documents after that date. Further, defendant billed the Goulds for services rendered and the Goulds paid in full. Thus, the Goulds' execution of the documents defendant was retained to draft on July 19, 1999 constituted the "completion of the specific legal service that the lawyer was retained to perform." *Kloian, supra at 237-238*. As such, plaintiff's legal malpractice claim accrued on July 19, 1999 and the two year statute of limitations began running on that date. The two year statute of limitations thus expired on July 19, 2001. We do not construe defendant's July 14, 2004 affidavit as an extension of the [*7] professional relationship beyond the July 19, 1999 date because there is no dispute that defendant prepared the affidavit at the request of Peppler's attorney in the probate matter, not plaintiff or her attorney. Thus plaintiff's March 13, 2006 complaint was barred by the applicable two-year statute of limitations, *MCL 600.5805(6)*, in conjunction with, *MCL 600.5838(1)*, the last treatment rule.

B. *MCL 600.5838(2)*

Plaintiff also contends that there is support for the assertion that she should not have been able to discover her cause of action against defendant until July 2006 when the probate court ruled on her petition for interpretation and construction of the trust. She argues her claim is timely based on the six-month provision found in *MCL 600.5838(2)*. Defendant counters that plaintiff either discovered or could have discovered the existence of a possible cause of action for legal malpractice against defendant significantly more than six months prior to the date she filed her complaint on March 13, 2006. In support, defendant asserts that the struggle regarding the joint trust ensued shortly after plaintiff's husband Robert's death on February 10, 2004 and defendant was deposed by [*8] plaintiff regarding the testamentary documents on July 28, 2004. Thus, it is defendant's position that plaintiff either discovered or could have discovered the existence of a possible cause of action for legal malpractice against defendant on July 28, 2004 and her complaint was not timely filed even when considering the six-month provision found in *MCL 600.5838(2)*.

After reviewing the record, we conclude that the six-month discovery rule contained in *MCL 600.5838(2)* does not apply in this case to extend the statute of limitations beyond the general two-year period provided in *MCL 600.5805(6)*. Plaintiff bears the burden of proof with respect to the applicability of the discovery rule, *MCL 600.5838(2)*, and she has not met her burden. The record shows that plaintiff's counsel in the probate matter deposed defendant extensively regarding his drafting of the testamentary documents, the decision to execute a joint trust rather than separate trusts, and other possible ambiguities present in the documents. Due to the litigation with Peppler regarding the trust and the discovery that followed including defendant's deposition, we conclude that plaintiff either discovered or should have discovered [*9] the existence of the potential malpractice claim, at the latest, by the date of defendant's deposition, July 28, 2004. *MCL 600.5838(2)*. Plaintiff's complaint was not filed until March 13, 2006, obviously well over six months later. Therefore, the trial court properly concluded that the claim is barred.

Affirmed.

/s/ Pat M. Donofrio

/s/ William B. Murphy

/s/ E. Thomas Fitzgerald

EXHIBIT 8

Habib Mamou & v. & M Corp.

Court of Appeals of Michigan

June 10, 2008, Decided

No. 275862

Reporter
2008 Mich. App. LEXIS 1202; 2008 WL 2357670

HABIB MAMOU and V & M CORPORATION, d/b/a ROYAL OAK WASTE PAPER AND METAL COMPANY NO. 2, Plaintiffs/Counter-Defendants-Appellants, v EDWARD C. CUTLIP, JR., Defendant-Appellee, and KERR, RUSSELL & WEBER, P.L.C., Defendant/Counter-Plaintiff-Appellee.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Appeal denied by *Mamou v. Cutlip, 2009 Mich. LEXIS 593 (Mich., Mar. 23, 2009)*

Prior History: [*1] Wayne Circuit Court. LC No. 04-432424-NM.

Disposition: Affirmed.

Core Terms

summary disposition, preparation, statute of limitations, malpractice, plaintiffs', malpractice claim, accrues, matters

Judges: Before: Servitto, P.J., and Cavanagh and Kelly, JJ.

Opinion

PER CURIAM.

Plaintiffs/counter-defendants, Habib Mamou ("Mamou") and V & M Corporation, d/b/a Royal Oak Waste Paper and Metal Company No. 2 ("V & M") (collectively, "plaintiffs"), appeal as of right the trial court's order dismissing the counter-complaint of defendant/counter-plaintiff, Kerr, Russell, and Weber, P.L.C. ("KRW"), without prejudice. On appeal, plaintiffs challenge the trial court's earlier order granting defendants summary disposition. We affirm.

I. Basic Facts and Proceedings

In 1995, Mamou had a dispute with his cousin, Joseph Mammo ("Joseph"), regarding whether Joseph had an ownership interest in V & M, and they reached an oral agreement. Mamou contacted defendant Edward C. Cutlip, Jr., an attorney with KRW, who had represented Mamou in various matters since 1991 or 1992. Cutlip prepared a release of any and all claims of ownership of V & M by Joseph in exchange for the payment of $ 75,000, and Mamou and Joseph signed this document. Joseph, however, claimed that Mamou represented that the release he signed was actually a document to effect the sale of V & M to an outside [*2] party. In late 1999 or early 2000, Joseph learned that Mamou still owned V & M. In June 2000, Joseph filed suit against plaintiffs in the Oakland Circuit Court, claiming, among other things, that Mamou had fraudulently induced him to convey his shareholder's interest in V & M. Plaintiffs, represented by defendants, sought summary disposition, arguing in part that Joseph's claims were barred by the 1995 release. In response, Joseph claimed, in pertinent part, that the release was false and fraudulent, he had not signed it, and that, if he had signed it, he had been fraudulently induced into doing so. On October 25, 2000, the Oakland Circuit Court denied plaintiffs' motion for summary disposition, finding that there was a genuine issue of material fact with respect to the validity of the release. Joseph and Mamou eventually settled their dispute, and the Oakland Circuit Court entered an order dismissing the action on December 3, 2002.

On October 18, 2004, plaintiffs filed their complaint in the instant action in the Wayne Circuit Court, alleging in part that defendants committed malpractice in connection with the preparation and execution of the

release. The trial court granted defendants' [*3] motion for summary disposition because plaintiffs had failed to establish proximate cause and the action was barred by the statute of limitations.

II. Analysis

Plaintiffs argue that the trial court erred in granting defendants summary disposition because their claims were not barred by the statute of limitations. We disagree.

We review de novo a motion for summary disposition pursuant to MCR 2.116(C)(7). Trentadue v Buckler Lawn Sprinkler, 479 Mich. 378, 386; 738 N.W.2d 664 (2007). In the absence of disputed facts, this Court also reviews de novo issues regarding whether a cause of action is barred by the applicable statute of limitations. *Id.* When reviewing a ruling on a motion for summary disposition, this Court views the evidence in the light most favorable to the nonmoving party. Joliet v Pitoniak, 475 Mich. 30, 35; 715 N.W.2d 60 (2006). This Court considers "all affidavits, pleadings, and other documentary evidence submitted by the parties and construe[s] the pleadings in plaintiff's favor." Doe v Roman Catholic Archbishop of Archdiocese of Detroit, 264 Mich. App. 632, 638; 692 N.W.2d 398 (2004).

"A legal malpractice claim must be brought within two years of the date the claim [*4] accrues, or within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." Kloian v Schwartz, 272 Mich. App. 232, 237; 725 N.W.2d 671 (2006), see also MCL 600.5805(6); MCL 600.5838. MCL 600.5838(1), which is a codification of the common law "last treatment rule," provides that a claim for professional malpractice other than medical malpractice "accrues at the time that person discontinues serving the plaintiff . . . as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." Levy v Martin, 463 Mich. 478, 482-484 and nn 13, 15, 487; 620 N.W.2d 292 (2001). An attorney discontinues serving a client when he "is relieved of that obligation by the client or the court[,]" or "upon completion of the specific legal service that the lawyer was retained to perform." Kloian, supra at 237-238; see also Maddox v Burlingame, 205 Mich. App. 446, 450; 517 N.W.2d 816 (1994). Thus, "a [*5] plaintiff's legal malpractice claim accrues on the day that the attorney last provides professional service in the specific matter out of which the malpractice claim arose." *Id.*, citing Gebhardt v O'Rourke, 444 Mich. 535, 543; 510 N.W.2d 900 (1994).

Plaintiffs assert that defendants' representation was not limited to the drafting of the release, but it continued through December 3, 2002, when the Oakland Circuit Court action was dismissed. In Levy, supra at 480-481, 485-487, our Supreme Court applied § 5838(1) and held that, where the defendant accountants had prepared the plaintiffs' annual tax returns from 1974 until 1996, the plaintiff's malpractice claims regarding returns filed in 1992 and 1993 did not accrue until 1996, when the professional relationship ended. The Court found that the defendants had provided the plaintiffs with "generalized tax preparation services", rather than "professional advice for a specific problem," and the defendants had presented no evidence that "each annual income tax preparation was a discrete transaction that was in no way interrelated with other transactions." *Id.* at 489-490 and n 19. This Court has held that an attorney continued to represent [*6] clients with respect to the sale of their business nearly two years after the closing because he had contacted them and their Florida attorney, conducted research on applicable Florida law, prepared a memorandum for the file, and billed them for the work he performed. Maddox v Burlingame, 205 Mich. App. 446, 447-448, 451; 517 N.W.2d 816 (1994). It is also worth noting that the *Maddox* Court observed that the plaintiffs had alleged in their complaint that the defendant had been in continuous contact with them from the time of the closing until the date he spoke with the Florida attorney and performed research on Florida law. *Id.* at 448. In Bauer v Ferriby & Houston, PC, 235 Mich. App. 536; 599 N.W.2d 493 (1999), this Court reached a contrary result. The defendant attorney attempted to correct an alleged error in an order that had been entered with respect to a worker's compensation settlement he had effected because the plaintiff's subsequent attorney informed him that it might affect the plaintiff's social security benefits. *Id.* at 537. The Court noted that the defendant had not billed the plaintiff for the "follow-up efforts," and it found that the defendant's activities were "a response [*7] to a complaint about an earlier, terminated representation," rather than a "legal service in furtherance of a continuing or renewed attorney-client relationship." *Id.* at 540.

KRW represented plaintiffs in various matters, including V & M nuisance claims, estate planning, and corporate matters, beginning in 1991 or 1992. Mamou called Cutlip in May or June 1995, explained his dispute with

Joseph and their oral agreement, and requested a release. When Mamou received the release in the mail, he was satisfied that it fulfilled the purpose for which he had requested it. Mamou admitted that, after signing the release on June 15, 1995, he thought the dispute concerning Joseph's claim to V & M was over, and he did not ask defendants to do anything further with respect to that dispute for the rest of 1995, 1996, 1997, or 1998. Defendants did not submit billing records from this period or any other evidence indicating that there was contact with plaintiffs during this period. Mamou did not contact Cutlip again until late 1999 or early 2000, when Joseph confronted Mamou and claimed to own half of V & M.

Given this significant period of inactivity, we cannot conclude that defendants were still [*8] serving plaintiffs in connection with the release when Mamou contacted Cutlip in 1999 or 2000, which makes the facts of this case significantly different from those in *Maddox*. Similarly, there is no evidence that defendants were providing plaintiffs with "continuing services" during this period, unlike *Levy*. Further, even if KRW were providing continuing services to plaintiffs, there is no evidence to suggest that these continuing services were "the matters out of which the claim for malpractice arose." *Levy, supra at 489* (internal quotation marks and citation omitted). The evidence indicates that the preparation of the release was a discrete transaction. Cutlip denied that Mamou had asked him to conclude a settlement and resolution of Joseph's claims of ownership in V & M. Rather, he explained that Mamou "engaged [him] for the specific purpose of preparing a release to document th[e] settlement" with Joseph, and his "limited engagement with respect to this matter concerned the preparation of the release."

Mamou reestablished contact with Cutlip in 1999 or 2000, not because he believed the release was defective or Cutlip's representation had been inadequate, but to consult with Cutlip [*9] about Joseph's claim of ownership in V & M. This conversation eventually led to defendants' representation of plaintiffs in the lawsuit Joseph brought against plaintiffs. Although the release eventually became an issue, i.e., as a defense to Joseph's claims against plaintiffs, this representation of plaintiffs was a separate matter from the preparation of the release in 1995. We therefore conclude that plaintiffs' claim of malpractice with respect to the release accrued in June 1995, after the release was signed, and the statute of limitations expired in 1997. [1]

The six-month discovery rule contained in § 5838(2) does not apply in this case to extend the statute of limitations beyond the general two-year period provided in § 5805(6). Plaintiffs bear the burden of proof with respect to the applicability of the discovery rule, *MCL 600.5838(2)*, and they have not argued that it applies. In any event, Mamou testified that he concluded that defendants had made a mistake with [*10] respect to the release about a week or ten days after the Oakland Circuit Court denied plaintiffs' motion for summary disposition, which occurred on October 25, 2000. Therefore, Mamou was actually aware of a potential malpractice claim, at the latest, by November 2000. See *Solowy v Oakwood Hosp, 454 Mich. 214, 222-223; 561 N.W.2d 843 (1997)*. The complaint was not filed until October 18, 2004, obviously well over six months later. Therefore, the trial court properly concluded that the claim is barred.

Because we find the statute of limitations issue dispositive, we decline to address plaintiffs' remaining arguments on appeal.

Affirmed.

/s/ Deborah A. Servitto

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly

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[1] Although plaintiffs' complaint contained allegations regarding the Joseph litigation, which would not be barred by the statute of limitations, plaintiffs do not raise any issues regarding these claims in this appeal.

EXHIBIT 9

ALKEN-ZIEGLER, INC. v. GEORGE BEARUP, & SMITH

Court of Appeals of Michigan

March 9, 2006, Decided

No. 264513

Reporter
2006 Mich. App. LEXIS 615; 2006 WL 572571

ALKEN-ZIEGLER, INC., Plaintiff-Appellant, v GEORGE BEARUP, and SMITH, HAUGHEY, RICE & ROEGGE, P.C., Defendants-Appellees.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Kent Circuit Court. LC No. 05-003989-CZ.

Core Terms

malpractice, statute of limitations, trial court, discontinued, defendants', attorneys, fiduciary relationship, documentary evidence, malpractice claim, legal services, law firm, time-barred, fiduciary, breached

Judges: Before: Bandstra, P.J., and White and Fort Hood, JJ.

Opinion

PER CURIAM.

In this action alleging legal malpractice, breach of contract, and breach of fiduciary duty, plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants under MCR 2.116(C)(7). We affirm.

In 1994, plaintiff filed suit against Waterbury Headers Corporation for breach of contract and breach of implied warranty. Defendants [1] represented plaintiff in the Waterbury Headers matter. A default judgment was entered against Waterbury Headers, which was ultimately affirmed by the Michigan Supreme Court. However, because Waterbury Headers no longer maintained a presence in Michigan, plaintiff retained a Connecticut law firm to sue in Connecticut state court to enforce the judgment. The Connecticut trial court determined that the Michigan courts lacked personal jurisdiction over Waterbury Headers, and refused to enforce the Michigan default judgment. [*2] Although defendants never appeared in the Connecticut action, they continued to monitor the litigation and to represent plaintiff in the Waterbury Headers matter until October 2002. Neither defendants nor the Connecticut law firm sought an appeal of the Connecticut court's ruling, and the time for appeal expired.

Plaintiff brought the instant action against defendants, claiming that they committed legal malpractice by failing to direct an appeal of the Connecticut trial court's order. In addition, plaintiff claimed that defendant Bearup had contractually agreed to instruct the Connecticut law firm to appeal the order. Finally, under a durable power of attorney that had been previously executed between defendant Bearup and plaintiff's owner, plaintiff claimed that Bearup breached his fiduciary duty by failing to direct an appeal of the Connecticut court's order. The trial court found that all three of plaintiff's claims sounded in legal malpractice, [*3] applied the two-year malpractice statute of limitations, and dismissed the claims as time-barred under MCR 2.116(C)(7).

The gravamen of a plaintiff's claims and whether those claims are time-barred by the statute of limitations are questions examined under MCR 2.116(C)(7). Bryant v Oakpointe Villa Nursing Centre, Inc, 471 Mich. 411, 419; 684 N.W.2d 864 (2004). We review de novo a trial court's ruling on a motion for summary disposition brought under MCR 2.116(C)(7), considering all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it. *Id.*

[1] Defendant Bearup is an attorney affiliated with defendant law firm.

Plaintiff first argues that its legal malpractice claim was not time-barred because the malpractice statute of limitations had not yet begun to run. We disagree. "The period of limitations is 2 years for an action charging malpractice." MCL 600.5805(6). A claim based on professional malpractice "accrues at the time that [the professional] discontinues serving the plaintiff in a professional or pseudo professional [*4] capacity *as to the matters out of which the claim formal practice arose . . .*" MCL 600.5838 (emphasis added). Stated another way, a legal malpractice claim accrues" when [the defendant] last provided professional service for [the plaintiff] *in the underlying . . . matter.*" Gebhardt v O'Rourke, 444 Mich. 535, 541; 510 N.W.2d 900 (1994) (emphasis added).

The moving party has the initial burden to support its claim for summary disposition under MCR 2.116(C)(7) by admissible documentary evidence. American Federation of State, Co and Municipal Employees v Detroit, 267 Mich. App. 255, 261; 704 N.W.2d 712 (2005). Defendants submitted documentary evidence, including an affidavit and billing records, showing that they discontinued representing plaintiff in the Waterbury Headers matter on October 11, 2002. Thus, although they continued to represent plaintiff on other matters, the evidence indicated that defendants' services with respect to the matters out of which the claim for malpractice arose concluded in October 2002.

The burden then shifted to plaintiff to demonstrate [*5] the existence of a factual dispute regarding the timing of accrual. *Id.* However, plaintiff failed to present any documentary evidence showing that defendants' representation in the Waterbury Headers matter extended beyond October 11, 2002, thereby failing to establish a genuine factual dispute regarding when defendants' representation in the Waterbury Headers matter terminated. Because no factual dispute existed concerning the date of accrual, the trial court properly determined that defendants' services in the Waterbury Headers matte rended in October 2002. Plaintiff's legal malpractice claim, filed in April 2005, was time-barred by the two-year malpractice statute of limitations.

Plaintiff cites State Bar of Michigan v Daggs, 384 Mich. 729, 732; 187 N.W.2d 227 (1971), K73 Corp v Stancati, 174 Mich. App. 225, 228-229; 435 N.W.2d 433 (1988), and Basic Food Industries, Inc v Travis, Warren, Nayer & Burgoyne, 60 Mich. App. 492, 496; 231 N.W.2d 466 (1975), for the proposition that a lawyer does not discontinue serving a client until relieved of that obligation by the client or the trial court. [*6] Thus, plaintiff argues that even if the last actions taken by defendants in the Waterbury Headers matter occurred in October 2002, defendants never discontinued serving plaintiff in that matter because they were never officially relieved as counsel. While an attorney's representation of a client generally continues until the attorney is relieved of that obligation by the client or the court, Mitchell v Dougherty, 249 Mich. App. 668, 683; 644 N.W.2d 391 (2002), an attorney may also discontinue serving a client "upon completion of a specific legal service that the lawyer was retained to perform." Maddox v Burlingame, 205 Mich App 446, 450; 517 N.W.2d 816 (1994); see also Chapman v Sullivan, 161 Mich. App. 558, 561-562; 411 N.W.2d 754 (1987). Moreover, once a specific legal task has been performed and a matter has been closed, follow-up activities by the lawyer will not revive or extend the period of service to the client. Bauer v Ferriby & Houston, PC, 235 Mich. App. 536, 539; 599 N.W.2d 493 (1999).

As noted above, the documentary evidence showed that defendants' [*7] representation of plaintiff in the Waterbury Headers matter ended when they closed plaintiff's file and sent the final billing statement in October 2002. Plaintiff failed to present any documentary material to rebut or otherwise counter this evidence. Because defendants discontinued representing plaintiff in the Waterbury Headers matter in October 2002, their service on that specific issue terminated at that time, and no formal discharge was necessary. Chapman, supra at 561-562.

Plaintiff next argues that defendants breached their contractual duty to direct the Connecticut law firm to appeal the Connecticut court's ruling. Plaintiff asserts that this breach of contract claim is distinct from its malpractice claim, and that the trial court improperly dismissed it as time-barred under the malpractice statute of limitations. We disagree. "The gravamen of an action is determined by reading the claim as a whole." Aldred v O'Hara-Bruce, 184 Mich. App. 488, 490; 458 N.W.2d 671 (1990). "Claims against attorneys brought on the basis of inadequate representation sound in tort and are governed by the malpractice statute of limitations, even [*8] though a plaintiff may assert that the attorney's actions breached a contract." *Id.* Attorneys may be held liable under a contract theory, but only when it is shown that the attorney breached a "special agreement" rather than a general agreement to provide requisite skill or adequate legal services. Brownell v Garber, 199 Mich. App. 519, 524-526; 503

N.W.2d 81 (1993). A "special agreement" is a "contract to perform a specific act," as opposed to a general agreement "to exercise appropriate legal skill in providing representation in a lawsuit." Barnard v Dilley, 134 Mich App 375, 378; 350 N.W.2d 887 (1984).

Plaintiff alleged in its complaint that "there existed a contract between [plaintiff] and Bearup by which Bearup agreed to communicate any necessary information to [plaintiff's] Connecticut counsel in the Connecticut Action." Plaintiff asserts that under this alleged agreement, defendant Bearup was contractually obligated to direct the Connecticut attorneys to appeal the Connecticut court's adverse ruling. However, the specific language of the pleadings shows that this was not a "special agreement" to achieve a [*9] specific result, but rather an agreement to render adequate legal services during the course of the Connecticut enforcement action. Plaintiff's claim that damages flowed from defendants' failure to exercise the requisite degree of legal skill sounds in malpractice only. Brownell, supra at 525; Barnard, supra at 378. "The two-year [malpractice] statute applies to a legal malpractice action even when phrased as a breach of contract to render competent legal services." *See bacher v* Fitzgerald, Hodgman, Cawthorne & King, PC, 181 Mich. App. 642, 646; 449 N.W.2d 673 (1989). The malpractice statute of limitations was thus properly applied to bar plaintiff's "breach of contract" claim. *Id.*

Finally, plaintiff argues that defendant Bearup breached his fiduciary duty, which was established under a general power of attorney executed between plaintiff's owner and defendant Bearup. Plaintiff asserts that the breach of fiduciary duty claim is distinct from the malpractice claim, and that the trial court improperly applied the malpractice statute of limitations. We disagree. The power of attorney document in this case granted [*10] Bearup broad powers to "commence, prosecute, enforce or to defend, answer, oppose, or confess all claims, suits, actions, or other judicial or administrative proceedings . .. ." While the grant of a general power of attorney forms a fiduciary relationship between the principal and the attorney-in-fact, In re Susser Estate, 254 Mich. App. 232, 235; 657 N.W.2d 147 (2002), the existence of an attorney-client relationship per se establishes an identical fiduciary relationship. Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC, 107 Mich. App. 509, 514-515; 309 N.W.2d 645 (1981). Thus, defendant Bearup's fiduciary obligations under the power of attorney were not separate and independent of his status as plaintiff's attorney, but were duplicative of those already owed as plaintiff's lawyer.

Claims against attorneys brought on the basis of inadequate representation sound in malpractice only, and are governed by the malpractice statute of limitations regardless of the label they are given. Aldred, supra at 490. The fiduciary relationship created by the general power of attorney document merely contemplated [*11] that defendant Bearup would provide adequate legal services to plaintiff's owner. A similar fiduciary relationship already existed by virtue of Bearup's dual status as plaintiff's lawyer. Fassihi, supra at 514-515. Any claim arising out of the fiduciary relationship between plaintiff's owner and defendant Bearup sounded in legal malpractice only, and was subject to the two-year malpractice statute of limitations. Aldred, supra at 490.

We affirm.

/s/ Richard A. Bandstra

/s/ Helene N. White

/s/ Karen M. Fort Hood

EXHIBIT 10

GARY R. DETTLOFF v. DOLD, SPATH, & MCKELVIE

Court of Appeals of Michigan

March 20, 1998, Decided

No. 199426

Reporter
1998 Mich. App. LEXIS 2585; 1998 WL 1997657

GARY R. DETTLOFF, PENSACOLA LIMITED PARTNERSHIP, and CANTONMENT LIMITED PARTNERSHIP, Plaintiffs-Appellants/Cross-Appellees, v DOLD, SPATH, & MCKELVIE, P.C., Defendant-Appellee/Cross-Appellant.

Notice: [*1] IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Wayne Circuit Court. LC No. 96-600595 NM.

Disposition: Affirmed.

Core Terms

documents, statute of limitations, plaintiffs', fraudulent concealment, conflicting interest, malpractice claim, cause of action, legal services, cross appeal, trial court, last date, discontinues, malpractice, drafted, serving

Case Summary

Procedural Posture

Plaintiff clients sought review of the order from the Wayne Circuit Court (Michigan), which granted defendant law firm's motion for a summary disposition pursuant to *Mich. Ct. R. 2.116(C)(7)*.

Overview

The clients' filed a legal malpractice action against the law firm. The circuit court granted the law firm's motion for a summary disposition pursuant to *Mich. Ct. R. 2.116(C)(7)*. On cross appeal, the law firm contended that the circuit court erred in holding that the clients' claims were not barred by the statute of limitation. The court affirmed the order granting the law firm's motion for a summary disposition. The court held that the clients' legal malpractice action was barred by the two-year provision of the statute of limitation. The law firm completed service to the clients when the drafting of a certain release was completed, not on the date that the release was executed.

Outcome

The court affirmed the circuit court's order granting the law firm's motion for a summary disposition.

LexisNexis® Headnotes

Governments > Legislation > Statute of Limitations > General Overview

Torts > Malpractice & Professional Liability > Attorneys

Torts > Procedural Matters > Statute of Limitations > General Overview

HN1 A legal malpractice action must be brought within one of the following time frames: two years after the date the attorney discontinues serving the plaintiff, or six months after the plaintiff discovers or should have discovered the claim, whichever is later. *Mich. Comp. Laws § 600.5805*, (Mich. Stat. Ann. § 27A.5805); *Mich. Comp. Laws § 600.5838*, (Mich. Stat. Ann. § 27A.5838).

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Malpractice & Professional Liability > Attorneys

Torts > Procedural Matters > Statute of Limitations > General Overview

HN2 A lawyer discontinues serving a client when relieved of the obligation by the client or the court, upon completion of a specific legal service that the lawyer was retained to perform, or upon the retention of an alternative attorney.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > Tolling

Torts > Procedural Matters > Statute of Limitations > General Overview

HN3 The operation of the statute of limitation may be postponed where there is fraudulent concealment of the fact that the plaintiff has a cause of action. However, if plaintiff knows of the cause of action there can be no concealment.

Judges: Before: Gribbs, P.J., and Cavanagh and Saad, JJ.

Opinion

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendant's motion for summary disposition pursuant to *MCR 2.116(C)(7)*. Defendants cross appeal the trial court holding that plaintiffs' claims were not barred by the statute of limitation. We affirm.

Because we find that it is dispositive of this case, we address defendant's claim on cross appeal. Defendant asserts that plaintiff's claim of legal malpractice is barred by the statute of limitation, and we agree.

HN1 A legal malpractice action must be brought within one of the following time frames: two years after the date the attorney discontinues serving the plaintiff, or six months after the plaintiff discovers or should have discovered the claim, whichever is later. *MCL 600.5805*; MSA 27A.5805; *MCL 600.5838*; MSA 27A.5838; *K73 Corp v Stancati, 174 Mich App 225, 227-228; 435 NW2d 433 (1988)*. [*2] Both time limits had expired when plaintiffs filed their malpractice claim against defendant.

The trial court found the last date of service to be June 28, 1994, the date of the execution of the release agreement. However, defendant had completed work on the documents which are the subject of the malpractice claim by January 1992. ***HN2*** A lawyer discontinues serving a client when relieved of the obligation by the client or the court, upon completion of a specific legal service that the lawyer was retained to perform, or upon the retention of an alternative attorney. *Maddox v Burlingame, 205 Mich App 446, 450; 517 NW2d 816 (1994)*. We conclude that the trial court erred in finding that the last date of service was the date that the release was executed. The execution of the release was done in the context of an adversarial proceeding in which defendant was seeking to recover legal fees from plaintiffs. Thus, since defendant completed the specific legal service of drafting legal documents for plaintiffs in January 1992, and the present action was filed on January 5, 1996, plaintiffs' complaint was barred by the two-year provision of the statute of limitation.

[*3] ***HN3*** The operation of the statute of limitation may be postponed where there is fraudulent concealment of the fact that the plaintiff has a cause of action. However, if plaintiff knows of the cause of action there can be no concealment. *Eschenbacher v Hier, 363 Mich 676, 681-682; 110 NW2d 731 (1961)*. Plaintiffs allege that the documents prepared by defendant were deficient and that there was a conflict of interest that should have prevented defendant from representing plaintiffs, which was not discovered until 1995. However, the alleged inadequacies of the documents were or should have been apparent in 1991 and 1992, when the documents were drafted. Plaintiffs do not allege that there was fraudulent concealment which made the documents appear adequate until 1995, when the conflict of interest was discovered. Therefore, plaintiffs' claims are barred by the statute of limitation.

Affirmed.

/s/ Roman S. Gribbs

/s/ Mark J. Cavanagh

/s/ Henry William Saad

EXHIBIT 11

Old Cf v. Rehmann Group

Court of Appeals of Michigan

September 20, 2012, Decided

No. 307484

Reporter
2012 Mich. App. LEXIS 1836; 2012 WL 4215753

OLD CF, INC, f/k/a CHASE FARMS, INC, and OLD PCS, LLC, f/k/a PREMIER COLD STORAGE, LLC, Plaintiffs-Appellants, v REHMANN GROUP, LLC, REHMANN ACCOUNTING, LLC, and ROBSON ACCOUNTING, INC, Defendants-Appellees.

Subsequent History: Leave to appeal denied by *Old CF, Inc. v. Rehmann Group, LLC, 2013 Mich. LEXIS 69 (Mich., Jan. 25, 2013)*

Prior History: [*1] Kent Circuit Court. LC No. 11-001859-NM.

Core Terms

audit, engagement, malpractice, accounting services, services, accounting, discrete, limitations, untimely, accrued, trial court, preparation, terminated, matters, financial statement, two year, contracted, returns, annual

Judges: Before: M. J. KELLY, P.J., and HOEKSTRA and STEPHENS, JJ.

Opinion

Per Curiam.

In this suit involving allegations of accounting malpractice, plaintiffs Old CF, Inc., which was formerly known as Chase Farms, Inc. (Chase Farms), and Old PCS, Inc., which was formerly known as Premier Cold Storage, LLC (Premier), appeal by right the trial court's order dismissing their claims against defendants Rehmann Group, LLC, Rehmann Accounting, LLC, and Robson Accounting, Inc. (collectively Rehmann). On appeal, we conclude that the trial court correctly determined that Chase Farms and Premier's claims were untimely and, therefore, did not err when it dismissed their claims against Rehmann under *MCR 2.116(C)(7)*. Accordingly, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Chase Farms purchased fruits and vegetables from growers, processed the fruits and vegetables, and then sold them to wholesalers. Premier, which was affiliated with Chase Farms, owned and operated a cold storage facility near Chase Farms. Chase Farms stored its processed fruits and vegetables at Premier's facility before shipping the products to its wholesalers.

Chase Farms contracted with Rehmann to audit [*2] and express an opinion on Chase Farms' annual financial statements at various times. In August 2007, Rehmann expressed its opinion that Chase Farms fairly presented its financial position in the financial statements for the fiscal year ending in March 2007. During the time relevant to the 2007 audit, Chase Farms expanded its business using approximately $19 million in bank loans. In late 2008, it was discovered that Chase Farms had overstated its inventory by millions of dollars. As a result, it was in breach of its covenants with the bank. The bank then foreclosed on Chase Farms and Premier and liquidated their assets.

In February 2011, Chase Farms and Premier sued Rehmann for professional negligence and unjust enrichment.[1] They alleged that Rehmann failed to follow the Generally Accepted Auditing Standards for Chase Farms' 2007 audit and, thereby, breached their duty to both Chase Farms and Premier. They further alleged that this breach proximately caused the "destruction" of

[1] The second claim was titled "Disgorgement of Fees", but appeared to be premised on a theory of unjust enrichment.

Chase Farms and Premier. Specifically, they alleged that, had Rehmann properly conducted the 2007 audit, Rehmann would have discovered the overstated inventory and issued an appropriate opinion. With the corrected [*3] information, Chase Farms and Premier would have "scaled back" their expansion, borrowed less money, and would not have lost their businesses.

Rehmann moved for summary disposition in August 2011. Rehmann argued that Chase Farms and Premier's claims were untimely under the two-year period of limitations applicable to malpractice claims. Rehmann presented evidence in the form of an engagement letter that showed that Chase Farms contracted with Rehmann to provide a discrete service with a defined endpoint: an audit of Chase Farms' 2007 financial statements, which it completed with the audit's delivery. Rehmann conceded that it provided additional services at times after the 2007 audit, but argued that those services amounted to new matters that also had discrete start and end points. Rehmann also argued that the undisputed evidence showed that Chase Farms and Premier discovered the discrepancy in the inventory by 2008 and, therefore, were untimely even under the six month period of limitations applicable under the discovery rule. Finally, Rehmann argued that the undisputed [*4] evidence showed that it did not owe any duty to Premier because Premier was not Rehmann's client for the 2007 audit and did not otherwise meet the requirements stated under *MCL 600.2962*.

In response, Chase Farms and Premier argued that the evidence showed that Chase Farms contracted with Rehmann for accounting services over a period of time and that, given this continuing relationship, it had two years from the date that Rehmann last provided an accounting service to Chase Farms to file its suit. Because it sued within two years of the date that Rehmann last performed an accounting service, Chase Farms and Premier maintained that their suit was timely. Premier also argued that, because it too contracted with Rehmann for accounting services and Rehmann knew that it would be relying on Chase Farms' audit, Rehmann could be liable to Premier for its failure to properly audit Chase Farms' financial statements.

After hearing oral arguments, the trial court determined that Rehmann provided discrete services to Chase Farms and that, accordingly, Chase Farms' cause of action accrued on the date that the particular service was complete. Because Chase Farms did not sue Rehmann until more than two [*5] years after Rehmann completed service with regard to the 2007 audit, the trial court determined that Chase Farms' suit was untimely. For the same reason, it determined that Premier's claims were also untimely. For that reason, it declined to determine whether Premier stated a viable claim against Rehmann as a third party under *MCL 600.2962*.

The trial court entered an order dismissing Chase Farms and Premier's claims under *MCR 2.116(C)(7)* in November 2011. This appeal followed.

II. SUMMARY DISPSOITION UNDER *MCR 2.116(C)(7)*

A. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision to grant summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc, 285 Mich App 362, 369; 775 NW2d 618 (2009)*. This Court also reviews de novo the proper interpretation of statutes and contracts. *Hunter v Hunter, 484 Mich 247, 257, 771 NW2d 694 (2009)*; *Rory v Continental Ins Co, 473 Mich 457, 464, 703 NW2d 23 (2005)*.

B. *MCR 2.116(C)(7)*

Under *MCR 2.116(C)(7)*, a defendant may be entitled to summary disposition if the plaintiff's claims are untimely under the applicable statute of limitations. The moving party may support a motion under *MCR 2.116(C)(7)* with affidavits, depositions, [*6] admissions, or other documentary evidence and the trial court must consider the supporting materials. *Maiden v Rozwood, 461 Mich 109, 119; 597 NW2d 817 (1999)*. The court must consider the documentary evidence in the light most favorable to the nonmoving party. *Zwiers v Growney, 286 Mich App 38, 42; 778 NW2d 81 (2009)*. If there is no factual dispute, whether a plaintiff's claim is barred under the applicable period of limitations is a matter of law for the court. *Id.*

C. THE LAST TREATMENT RULE

A person harmed by another's professional malpractice must sue the professional within two years of the date that his or her claim first accrued. *MCL 600.5805(1)*, *(6)*. This period of limitations applies to claims arising from accounting malpractice. *Local 1064, RWDSU AFL-CIO v Ernst & Young, 449 Mich 322, 333; 535 NW2d 187 (1995)*. A claim premised on accounting malpractice accrues when the professional "discontinues serving the plaintiff in a professional or psuedoprofessional

capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838(1).

Here, Rehmann argued that it discontinued serving [*7] Chase Farms when it delivered the 2007 audit in August 2007. Chase Farms and Premier, in contrast, argued that, because Rehmann continued to perform accounting services for Chase Farms to March 2009, it did not discontinue service until that date. The question before this Court is whether Chase Farms and Premier's claims accrued when Rehmann completed service on the 2007 audit or when it completed the last accounting service performed for Chase Farms. That is, we must determine whether and how MCL 600.5838(1) applies to the facts of this case.

Our Supreme Court examined MCL 600.5838(1) in Morgan v Taylor, 434 Mich 180; 451 NW2d 852 (1990). There the plaintiff, David Morgan, sued Dr. Marcus Taylor and the cooperative for which he worked for malpractice related to Taylor's failure to diagnose and treat Morgan's glaucoma after an eye examination in March 1981. Morgan, 434 Mich at 183. The question before the Supreme Court was whether Morgan's claim accrued after the eye examination in March 1981, which gave rise to his claim, or after the last eye examination that he had with the cooperative in August 1983. The Court explained that whether Morgan's claim accrued in 1981 or 1983 turned [*8] on the proper interpretation of MCL 600.5838(1), which it stated was a codification of the last treatment rule derived from common law. Id. at 186-187.

The rationale behind the last treatment rule is the reliance and trust that the person seeking the professional's care necessarily places in the professional; until the professional ceases performing, the person under the professional's care has no duty to inquire into the effectiveness of the professional's measures. Id. at 187-188. Where there were no occurrences or breaks in the continuity of care that demonstrate that the plaintiff's trust in the relationship had ended, the period of limitations begins to run on the last day of actual service. Id. at 188-190.

Turning to the facts of its case, the Court in *Morgan* concluded that there was no evidence that there had been an occurrence that "indicated a termination of the relationship" or "any abandonment by plaintiff of his trust in the defendant and its staff." Id. at 190-191. The Court found it noteworthy that the cooperative had a contractual obligation to continue providing care to Morgan: "in light of the contractual arrangement which bound defendant and entitled plaintiff to periodic [*9] eye examinations, it cannot be said that the relationship . . . terminated after each visit." Id. at 194. Rather, the obligation to properly treat Morgan extended beyond 1981 and the cooperative did not cease treating Morgan as to the matters out of which the claim for malpractice arose until August 1983.

In Levy v Martin, 463 Mich 478; 620 NW2d 292 (2001), our Supreme Court reaffirmed the continuing validity of the analysis stated in *Morgan* and applied it to a claim for accounting malpractice. In *Levy*, the defendants prepared the annual tax returns for the plaintiff from 1974 to 1996. Id. at 480-481. The plaintiff sued his accountants in August 1997 after he was compelled to pay additional taxes for 1991 and 1992. Id. at 481. Our Supreme Court determined that *Morgan* "was 'instructive and, *in appropriate circumstances*, controlling.'" Id. at 485 (citation omitted, emphasis added). Using the reasoning from *Morgan*, the Court in *Levy* held that the accountants' continued preparation of tax returns constituted the matters out of which the claim for malpractice arose: "it is clear here that plaintiffs, rather than receiving professional advice for a specific problem, were receiving generalized [*10] tax preparation services from defendants." Id. at 489. For that reason, the Court reversed the dismissal of the plaintiffs' malpractice claim as untimely. Id. at 491.

Although the Court in *Levy* determined that the last treatment rule applied to the accountants' preparation of annual tax returns in that case, the Court cautioned that its holding was limited to the unique facts of its case: "in the present case, defendants have not offered documentary evidence regarding the nature of the professional services that were provided by defendants to plaintiffs." Id. at 489-490 n 19. The Court explained that, because the defendants failed to present any evidence that each income tax preparation was a "discrete transaction that should be considered to separately constitute 'the matters out of which the claim for malpractice arose,' MCL 600.5838(1)", it was compelled to conclude that defendants had not established that the plaintiffs' claims were barred for purposes of a motion under MCR 2.116(C)(7). Levy, 463 Mich at 490 n 19. The Court stated that the result might have been different if the defendants had presented evidence that the annual tax preparations constituted discrete transactions: [*11] "Accordingly,

this opinion does not mean, for example, that if an accountant prepared income tax returns for a party annually over a period of decades, the statute of limitations for alleged negligence in preparing the first of these tax returns would not run until the overall professional relationship ended." *Id.*

D. APPLICATION TO THE FACTS

In this case, Rehmann plainly performed accounting services for Chase Farms over a period of time. However, unlike the case in *Levy*, Rehmann presented evidence that it did not perform generalized accounting services for Chase Farms, but instead performed discrete, individualized accounting services with defined start and end points. In support of its motion, Rehmann submitted an "engagement" letter that confirmed with Chase Farms "our understanding of the services we are to provide for Chase Farms, Inc. as of and for the year ended March 31, 2007." In the engagement letter, Rehmann stated that it would audit Chase Farm's financial statements for the year ending March 2007 and explained in detail the limits on the engagement. Indeed, Rehmann stated that, although it could perform extended procedures to detect fraud, it had not been engaged to do so [*12] and Chase Farms would have to hire it in a separate engagement if it wished Rehmann to perform that task. The engagement letter also provided that neither party would solicit for hire or consult with the other party's personnel during the *term of the engagement* and for one year after the engagement's termination and that Rehmann's maximum liability for "any negligent errors or omissions committed by us in the performance of the engagement will be limited to three times the amount of our fees *for this engagement* . . ." (emphases added). Rehmann also provided in the letter that "Our engagement ends on delivery of our audit report. Any follow-up services that might be required will be a separate, new engagement. The terms and conditions of that new engagement will be governed by a new, specific engagement letter for that service." Finally, Rehmann asked Chase Farms to sign and return the engagement letter if it agreed "with the terms of our engagement as described in the letter . . . ." Chase Farms' representative signed the letter of engagement and dated it July 2007.

In response to this motion, Chase Farms did not contest the validity of the engagement letter. Rather, it merely relied [*13] on the fact that Rehmann continued to provide it with accounting services after the 2007 audit and argued that, because Rehmann had to consider prior years when conducting the accounting services that Chase Farms engaged it to subsequently perform, Rehmann could not contend that each audit was a distinct transaction. But that argument ignores the terms of Chase Farms' agreement with Rehmann. By signing the engagement letter, Chase Farms plainly agreed that it was hiring Rehmann for a discrete and limited task—to audit its financial statements for the fiscal year ending March 2007. It further agreed that that engagement would end no later than the date that Rehmann delivered its audit to Chase Farms and that any future services would constitute a new engagement for services that would be governed by a new, specific engagement letter. Thus, Chase Farms agreed that Rehmann's professional services arising out of the 2007 audit would end on that date and that date is the date that Rehmann discontinued serving Chase Farms "as to the matters out of which the claim for malpractice arose . . . ." See MCL 600.5838(1). The engagement letter provided for an "occurrence" that terminated the relationship [*14] between Chase Farms and Rehmann: the delivery of the 2007 audit. See *Morgan, 434 Mich at 190-191* (stating that there must be evidence of an occurrence that terminated the relationship with the professional). The terms that Chase Farms agreed to in the engagement letter also are clear evidence that the parties intended the audit to be a "discrete transaction", notwithstanding that Chase Farms later hired Rehmann to perform additional accounting services. See *Levy, 463 Mich at 489-490 n 19*. Accordingly, Chase Farms and Premier's claims premised on accounting malpractice accrued when Rehmann delivered its audit in August 2007.[2]

III. CONCLUSION

The undisputed evidence shows that Chase Farms and Premier's cause of action for malpractice arising from Rehmann's handling of the 2007 audit accrued in August

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[2] Given our resolution of this case, we decline to consider whether Premier met the qualifications stated under ***MCL 600.2962***.

2007.[3] Moreover, it is undisputed that Chase Farms and Premier discovered the basis of their claims in 2008. However, Chase Farms and Premier did not sue within two years of the accrual date or six months of the date that they discovered the alleged malpractice. MCL 600.5805(1), [*15] (6); MCL 600.5838(1), (2). As such, their claims were untimely and the trial court did not err when it dismissed Chase Farms and Premier's claims under MCR 2.116(C)(7).

Affirmed. As the prevailing parties, Rehmann Group, LLC, Rehmann Accounting, LLC, and Robson Accounting, Inc., may tax their costs. MCR 7.219(A).

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra

/s/ Cynthia Diane Stephens

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[3] Because there is no dispute that the engagement letter represented the parties' agreement that the audit was for a discrete and individualized task with a defined termination date, there is—contrary to Chase Farms and Premier's argument on appeal—no factual dispute concerning the accrual date that must be submitted to a jury.

EXHIBIT 12

RLVIC, INC. v. DAWDA

Court of Appeals of Michigan

March 7, 2006, Decided

No. 265167

Reporter
2006 Mich. App. LEXIS 605; 2006 WL 547839

RLVIC, INC., f/k/a MARCAT MANUFACTURING COMPANY, and REMI L. VICTOR, JR., Plaintiffs-Appellants, v DAWDA, MANN, MULCAHY & SADLER, CURTIS J. MANN, WILLIAM L. ROSIN, and DANIEL M. ISRAEL, Defendants-Appellees.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Oakland Circuit Court. LC No. 03-053446-NM.

Disposition: Reversed and remanded for further proceedings. We do not retain jurisdiction.

Core Terms

billed, plaintiffs', certification, malpractice, services, statute of limitations, first amended complaint, legal services, discontinue

Judges: Before: Murray, P.J., and Cavanagh and Saad, JJ.

Opinion

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants' motion for summary disposition under *MCR 2.116(C)(7)*, and dismissing plaintiffs' first amended complaint, on the ground that plaintiffs' malpractice action was barred by the statute of limitations. We reverse and remand for further proceedings.

I. Facts and Procedural History

According to the allegations within plaintiffs' first amended complaint, plaintiff Remi Victor, as sole shareholder of plaintiff Marcat Manufacturing Co., retained the services of defendant attorneys and law firm (collectively "defendants") to perform all legal services necessary for the sale of Marcat's assets to a minority business, including having the transaction meet the certification requirements of the Michigan Minority Business Development [*2] Council (MMBDC). To effectuate this sale, in 1997 plaintiffs executed a purchase agreement, drafted by defendants, under which Spartan Industrial, [1] a minority business certified by the MMBDC agreed to purchase Marcat's assets for $ 3 million. The agreement was dependent upon approval by the MMBDC of the terms and conditions of the sale. In October 2000, defendants notified plaintiffs that the MMBDC withdrew Spartan's certification because, under the terms of the agreement, Spartan no longer met the MMBDC's requirements for a minority business enterprise. [2] Then, in October 2002, defendants drafted an agreement that reduced the purchase price from $ 3 million to $ 1.5 million and provided for the buy-out of Victor's interest in Spartan.

[*3] On June 3, 2003, plaintiffs initiated this action against defendants alleging that defendants were negligent in failing to draft the 1997 agreement to meet the requirements of the MMBDC, that defendants fraudulently concealed from plaintiffs that plaintiffs had

[1] During the negotiations and drafting of the purchase agreement, Spartan was represented by attorney Stanley Wise, of the firm Wise & Wise. According to Victor, he understood that it was Wise's responsibility to ensure certification of Spartan with the MMBDC after the parties signed the purchase agreement.

[2] Defendants were initially notified of the certification withdrawal by Wise, who, in October 2000, forwarded to defendants a July 2000 letter from the MMBDC.

a cause of action against defendants for legal malpractice, and that defendants fraudulently concealed from plaintiffs that plaintiffs were entitled to reclaim their assets due to Spartan's inability to pay the original $ 3 million purchase price.

Defendants moved for summary disposition under MCR 2.116(C)(7) on the ground that plaintiffs' first amended complaint was barred by the statute of limitations. Defendants contended that defendants discontinued representing plaintiffs in the sale of Marcat's assets in January 1998 and that the 2002 transaction was a distinct transaction giving rise to a new attorney-client relationship. The trial court agreed and granted defendants' motion on the ground that plaintiffs had untimely sued defendants.

II. Analysis

This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). Ousley v McLaren, 264 Mich. App. 486, 490; [*4] 691 N.W.2d 817 (2004). When reviewing a motion under MCR 2.116(C)(7), a court must accept all of the plaintiff's well-pleaded allegations as true and construe them most favorably to the plaintiff, unless the allegations are specifically contradicted by documentary evidence. Xu v Gay, 257 Mich. App. 263, 266; 668 N.W.2d 166 (2003). The court must consider all affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted, and the motion should be granted only if no factual development could provide a basis for recovery. *Id.* If there is no dispute as to the material facts, whether the malpractice claim was timely raises a question of law for the court to decide. Harris v Allen Park, 193 Mich. App. 103, 106; 483 N.W.2d 434 (1992). If, however, there is a dispute on a material fact, determination of the issue as a matter of law is inappropriate. Marrero v McDonnell Douglas Capital Corp, 200 Mich. App. 438, 441; 505 N.W.2d 275 (1993). [3]

[*5] Under MCL 600.5838, "[a] legal malpractice claim must be brought within two years of the date the attorney discontinues serving the client, or within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." Maddox v Burlingame, 205 Mich. App. 446, 450; 517 N.W.2d 816 (1994). [4] The "last treatment rule," as codified in MCL 600.5838(1), provides that the two-year statute of limitations governing legal malpractice claims does not begin to run when the professional has ceased to provide services with regard to a single matter; rather, the statute of limitations begins to run only when the professional has ceased providing services as to the broad "matters" out of which the claim arises. Levy v Martin, 463 Mich. 478, 489 n 18; 620 N.W.2d 292 (2001); Nugent v Weed, 183 Mich App 791, 796; 455 N.W.2d 409 (1990). "A lawyer discontinues serving a client when relieved of the obligation by the client or the court, or upon completion of a specific legal service that the lawyer was retained [*6] to perform." Maddox, supra at 450 (internal citation omitted).

Maddox is the most analogous case. In that case, the defendants consulted with the plaintiffs about the sale of a business, the closing for which took place in October 1986. Six months later, in April 1987, the plaintiffs told the defendants that the purchasers of the businesses were not making the contracted for payments, so the defendants revised the agreement. In March 1987, the defendants sent a letter, on behalf of the plaintiffs, to the purchasers demanding full payment. A month later the purchasers filed for bankruptcy, and in June 1988, the plaintiffs were told by another attorney that their security interest was ineffective. On August 15, 1988, the plaintiffs and the other attorney called the defendants about the problem, and the defendants researched the issue and billed the plaintiffs for the time. The plaintiffs then sued the defendants on August 14, 1990. The trial court dismissed the case on statute of limitations grounds.

This Court reversed, holding that the defendants isolated but continued work for the plaintiffs, for which the defendants billed the plaintiffs, compelled the conclusion [*7] that the defendants were still performing services for the plaintiffs on August 15, 1988:

> In the present case, we must accept as true plaintiffs' well-pleaded allegation that defendant sent them a bill for services rendered on August

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[3] In reviewing the trial court's decision, we have not considered volumes II or III of Curtis Mann's deposition. Although they were part of the record since they were filed two days before the motion hearing, see MCR 7.210(A)(1), plaintiffs did not cite that testimony to the trial court in arguing the respective motions. Karbel v Comerica Bank, 247 Mich. App. 90, 96-97; 635 N.W.2d 69 (2001); Pena v Ingham Co Rd Comm, 255 Mich. App. 299, 310; 660 N.W.2d 351 (2003).

[4] We note that this case does not involve the six-month discovery rule.

15, 1988. Defendant has not specifically denied this allegation. Defendant acknowledges that he did speak with plaintiffs and their Florida attorney, and also conducted legal research on August 15, 1988. At the initial hearing on defendant's motion for summary disposition held on July 10, 1991, the trial court found as fact that defendant did send plaintiffs a bill for services rendered on August 15, 1988.

We agree with counsel for defendant that a call by a disgruntled former client to his former lawyer, accusing him of professional malpractice, does not in itself constitute a continuation of prior representation in connection with the client's business for purposes of the statute of limitations. However, in such situation one would not expect the lawyer to bill the former client for the telephone call in question. In the present case, it appears that defendant reviewed applicable provisions of the UCC, contacted plaintiffs and their Florida attorney [*8] by phone, and made a memo to the file - all on August 15, 1988. It appears that defendant then billed plaintiffs for one hour of work for performing these services. In this factual setting, we are of the opinion that the work performed by defendant for plaintiffs, and duly billed to them, does constitute continuing representation following the 1986 sale of the business. We believe that an attorney's act of sending a bill constitutes an acknowledgment by the attorney that the attorney was performing legal services for the client. [*Id. at 450-451* (internal citation omitted).]

We believe that *Maddox* controls this case. As noted, plaintiffs' first amended complaint alleges that defendants were hired to effect the sale of Marcat's assets in such a way that the company would qualify for minority certification by the MMBDC. Although defendants contend that they were not responsible for obtaining the MMBDC certification [*9] (but that Stanley Wise was), the purpose in drafting the purchase agreement was to obtain the minority certification, as evidenced by the fact that the agreement itself was dependent upon approval by the MMBDC of the terms and conditions of the sale. Moreover, as in *Maddox*, defendant's own billing sheets show that they continued to consult with Wise and plaintiffs about the continuing problems with obtaining the MMBDC certification which, as we have noted, was the very reason for the purchase defendants were hired to arrange. The billing sheets indicate that defendants continued working and billing plaintiffs on the Spartan purchase in 1999, 2000 and 2001, with billing entries on the matter as late as October 22, 2002. Throughout these years, plaintiffs looked to defendants for answers and advice on any problems that arose with the purchase and the certification, and defendants billed plaintiff for that work. We therefore conclude that defendants did not discontinue serving plaintiffs in the matter out of which the malpractice claims arose in 1998 because, at that time, defendants had not completed the specific legal service they were retained to perform, and continued billing [*10] plaintiffs for work in regard to the purchase. See *Maddox, supra at 450-451*. Further, there is nothing to indicate a clear demarcation between the two allegedly discrete representations. We conclude that the billing sheets support plaintiffs' argument that there was an ongoing relationship between defendants and plaintiffs between 1997 and October 2002 and therefore, during that time, defendants provided legal services in furtherance of a continued attorney-client relationship. See *Levy, supra at 489-490*; *Bauer v Ferriby & Houston PC, 235 Mich App 536, 540; 599 N.W.2d 493 (1999)* (in affirming the trial court's dismissal, the Court noted that the defendant did not bill the plaintiff for any of the follow-up work, which was requested by another attorney, not the client). [5]

[*11] Thus, we hold that defendants did not discontinue serving plaintiffs regarding the broad matter out of which plaintiffs' claims arose until October 2002 and, therefore, plaintiffs' June 3, 2003, first amended complaint was timely under the two-year statute of limitations set forth in *MCL 600.5838*. *Levy, supra at 489 n 18*.

Because of our resolution of this issue, we need not address plaintiffs' contention that the trial court erred in denying the motion for reconsideration.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Christopher M. Murray

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[5] For consistency purposes, we note that the unpublished case relied on by defendants is unpersuasive. *Melody Farms Inc v Carson Fischer PLC,* unpublished opinion per curiam of the Court of Appeals, issued February 16, 2001 (Docket No. 215883). In that case, this Court specifically noted that there was no evidence that the law firm billed the client for any time during the relevant period.

/s/ Mark J. Cavanagh

/s/ Henry William Saad

EXHIBIT 13

Azzar v. Tolley

Court of Appeals of Michigan

November 2, 2004, Decided

No. 249879

Reporter
2004 Mich. App. LEXIS 2979; 2004 WL 2451938

JAMES AZZAR, Plaintiff-Appellant, v PETER R. TOLLEY and TOLLEY VANDENBOSCH KOROLEWICZ & BRENGLE, P.C., Defendants-Appellees.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Appeal denied by *Azzar v. Tolley, 2005 Mich. LEXIS 2282 (Mich., Nov. 10, 2005)*

Prior History: Kent Circuit Court. LC No. 01-008069-CH.

Disposition: Reversed and remanded. We do not retain jurisdiction.

Core Terms

law firm, malpractice claim, real estate transaction, general counsel, attorney-client, legal malpractice claim, summary disposition, malpractice, services, statute of limitations, legal services, advice, legal counsel, matters, serving

Judges: Before: Sawyer, P.J., and Smolenski and Schuette, JJ.

Opinion

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting a motion for summary disposition in favor of defendants. We reverse and remand for further proceedings before the trial court.

The basic issue in this appeal is whether the statute of limitations had run on plaintiff's legal malpractice claim against defendants, when plaintiff filed his complaint on May 12, 2001. More specifically, the issue is whether the statute of limitations was tolled when plaintiff's loan transaction with defendant Peter Tolley ended on January 29, 1997, or when plaintiff terminated his attorney-client relationship with Tolley on July 20, 1999.

According to plaintiff's complaint, from June 1993 through July 1999, plaintiff employed defendant Peter Tolley, a licensed attorney and shareholder of defendant law firm, and defendant law firm, as general legal [*2] counsel for plaintiff's companies. Additionally, in his deposition, defendant Tolley acknowledged that he first began performing legal services for plaintiff around 1975. Tolley further testified that prior to becoming plaintiff's attorney, plaintiff and Tolley had been personal friends. Commencing in June 1993 and ending in June 1999, Tolley served as general counsel for plaintiff's various companies. Tolley explained that while he was retained as general counsel for plaintiff's entities, plaintiff continued to employ defendant law firm for work that Tolley was unable to do. Tolley testified that in addition to performing legal services for plaintiff's companies, he performed many non-legal tasks for plaintiff, such as providing employment and human-resource advice.

In July 1994, Tolley expressed to plaintiff his interest in purchasing a parcel of land for development purposes. Following discussion between plaintiff and Tolley, plaintiff allegedly agreed to loan Tolley $ 98,000 for the land acquisition in return for Tolley's agreement to develop 145 acres of the land for profit. After developing the property and earning a profit, defendant Tolley allegedly agreed to repay plaintiff [*3] in full and split any remaining profits. Plaintiff also alleges that he agreed to advance the funds to Tolley "based entirely upon Plaintiff's absolute faith in Tolley [as his lawyer and legal advisor] and Plaintiff's complete reliance upon Tolley's representation that the Real Estate would be collateral for the repayment of the Advanced Funds."

Beginning July 6, 1994 and ending March 28, 1995, plaintiff made three cash advancements to Tolley

totaling $ 98,000. On July 22, 1994, defendant and defendant's wife, Cheryl Tolley, entered into a land contract with CBF Investment Company. On July 24, 1996, using money advanced by plaintiff along with a commercial loan obtained from a local bank, defendant and Cheryl Tolley purchased the property from CBF for $ 312,500, as tenants by the entirety.

On October 2, 1996 defendant Tolley paid plaintiff $ 10,622.91 and on January 27, 1997, Tolley paid plaintiff $ 1,000 on the cash advance. However, on January 29, 1997, pursuant to a divorce decree between Tolley and his wife, defendant Tolley conveyed all of his interest in the land to Cheryl Tolley by quitclaim deed. Following the conveyance of the real estate from defendant to Cheryl Tolley, [*4] plaintiff learned that "the Real Estate is not collateral for the repayment of the Advanced Funds." Furthermore, plaintiff asserts "Tolley has refused to repay Plaintiff the balance of the Advanced Funds [$ 86,377.09], and has stated that he is unable and/or unwilling to make further payments to Plaintiff."

The complaint alleged claims against defendant Tolley for breach of contract, promissory estoppel, and unjust enrichment. Plaintiff's complaint alleged Tolley and defendant law firm committed legal malpractice by failing to secure the repayment of plaintiff's loan. In support of his malpractice claim, plaintiff argued that because defendants never limited the scope of their legal representation, defendants owed several legal duties to plaintiff regarding plaintiff's cash advance for the real estate transaction.

In response, defendants argued that the two-year limitations period commenced in 1994 and 1995 when the cash advancement took place. Furthermore, defendants argued that plaintiff should have discovered the malpractice claim no later than six months after June 29, 1997, when defendant Tolley conveyed his property interest to Cheryl Tolley.

At a hearing on the motions [*5] for summary disposition, the court opined:

> Now we do have a situation here in which Mr. Tolley was general counsel, but this transaction is not something that he's doing in the general course of his representing Mr. Azzar and his various companies on their business. What you've got here is something unique. . . .
>
> I think under the circumstances, that I have to conclude that more than two years had expired since anything having to do with this transaction had occurred. That when one considers that . . . the only evidence I've got in front of me is that Mr. Azzar knew . . . that the land was being conveyed, that he received the last payment on it a couple of days earlier, that this suit wasn't filed for 52 months. . . The statute has run on this claim for malpractice. . . .

This Court reviews de novo a lower court's grant of a motion for summary disposition. *West v General Motors Corp, 469 Mich. 177, 183; 665 N.W.2d 468 (2003)*. Furthermore, the determination of whether a cause of action is barred by the statute of limitations is a question of law and will be reviewed de novo. *Colbert v Conybeare Law Office, 239 Mich. App. 608, 613-614;* [*6] 609 N.W.2d 208 (2000).

Plaintiff argues that the circuit court erred in concluding that plaintiff's legal malpractice claim was barred by the two-year statute of limitations because it incorrectly based its decision on the assumption that plaintiff knew or should have known of the cause of action in 1997, when defendant Tolley conveyed the land to Cheryl Tolley. [1] However, plaintiff relies on *MCL 600.5838(1)*, which provides:

> A claim based on the malpractice of a person who is, or holds himself out to be, a member of a state licensed profession accrues at the time that person discontinues treating or otherwise serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose.

Plaintiff also argues that pursuant to the last treatment rule, the statute of limitations for the legal malpractice claim did not accrue until July of 1999 when defendants were discharged by plaintiff. We agree.

[*7] The common law last treatment rule originated in the case of *De Haan v Winter, 258 Mich. 293, 296-297; 241 NW 923 (1932)*, in which the Michigan Supreme Court concluded that a medical malpractice claim does not commence until treatment for a specific injury is completed. *Levy v Martin, 463 Mich. 478, 483; 620 N.W.2d 292 (2001)*, citing *De Haan, supra.* Following

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[1] The trial court granted summary disposition in favor of plaintiff on the breach of contract claim and in favor of defendants on the other claims. Only the ruling on the malpractice claim is at issue in this appeal.

the Supreme Court's decision in *De Haan*, the Legislature enacted MCL 600.5838, which expanded the common law last treatment rule to provide that a malpractice claim "accrues at the time that person discontinues serving the plaintiff in a professional . . . capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim" *Levy, supra at 483*. This Court has further provided that legal counsel discontinues serving a plaintiff in a professional capacity when counsel is relieved of his legal obligation by either the client or the court, or upon completion of a specific legal service which counsel was retained [*8] to perform. *Balcom v Zambon, 254 Mich. App. 470, 484; 658 N.W.2d 156 (2002)*, quoting *Maddox v Burlingame, 205 Mich. App. 446, 450; 517 N.W.2d 816 (1994)*; *MCL 600.5805(5)*.

The last treatment rule has been expanded to apply to routine, periodic professional services unless there is an occurrence between services that terminates the trust of the original relationship. *Levy, supra, at 483, 485-486*. In *Levy*, the plaintiff dentist and his professional corporation retained the defendant accountants to prepare plaintiff's annual tax returns from 1974 to 1996. *Id. at 481*. Due to the defendants' improper preparation of tax returns for 1991 and 1992, the plaintiff was audited by the IRS and was required to pay additional taxes and penalty charges. *Id.* The plaintiff filed a malpractice claim against the defendants in 1997, which was dismissed as untimely by the circuit court. *Id.* The Michigan Supreme Court reversed the decisions of both the circuit court and this Court, holding that under the last treatment rule, the plaintiff's claim did not accrue until at [*9] least 1996. *Id. at 486*. The Court explained "it is clear here that plaintiffs, rather than receiving professional advice for a specific problem, were receiving generalized tax preparation services from defendants." *Id. at 489*.

Furthermore, in *Nugent v Weed, 183 Mich. App. 791, 793; 455 N.W.2d 409 (1990)*, the plaintiff hired the defendant as his attorney in 1971. In 1977, while representing the plaintiff, the defendant expanded his practice into a firm. *Id.* Based on the defendant's improper handling of the plaintiff's financial affairs, the plaintiff lost a substantial amount of money and subsequently fired the defendant as legal counsel in 1984. *Id.* In 1996, the plaintiff filed a legal malpractice claim against the defendant and the defendant's law firm. The trial court dismissed the plaintiff's claim as time-barred because the defendant had not represented the plaintiff individually since 1977. *Id. at 794*. This Court reversed the trial court's grant of summary disposition in favor of the defendants. The Court reasoned that the claim was not time-barred under Michigan law, because the defendant was "not retained [*10] to perform any specific legal service" and because "the only changes that occurred during the entire course of [defendant's] representation was the legal form of his practice. . . ." *Id. at 796*. Therefore, the Court held that "since [defendant] never 'discontinued servicing' [plaintiff] until March of 1984, plaintiffs' March, 1986, lawsuit, which was timely against the professional corporation was timely against [defendant] individually." *Id.*

Similarly, a federal court, in applying Michigan case law, has held that "where the parties have a longstanding relationship with respect to multiple interrelated matters, the statute of limitations generally has been held to run from the last date of service on all matters." *Ameriwood Industries Int'l Corp v Arthur Andersen & Co, 961 F. Supp. 1078, 1093 (WD Mich, 1997)*.

We find that the limitations period for plaintiff's malpractice claim began in 1999, when plaintiff formally discharged defendants. As established in *Levy, supra at 483, 485-486*, the last treatment rule applies to routine, periodic professional services unless there is an occurrence between services, which terminates [*11] the trust of the original relationship. This case is factually similar to *Levy, supra*, and *Nugent, supra*, in that defendants provided services to plaintiff for a period of years, commencing in 1975. In addition to serving as general counsel for plaintiff's corporations from 1994 to 1999, defendant Tolley testified that he performed many non-legal tasks for plaintiff, such as providing employment and human-resource advice. Therefore, like the plaintiffs in *Levy* and *Nugent*, plaintiff did not receive legal advice from defendants for a specific legal problem; instead, plaintiff received generalized legal services from Tolley. Because there were no interruptions in defendants' service to plaintiff until 1999, we conclude that plaintiff's 2001 legal malpractice claim was timely filed under *MCL 600.5838(1)*.

Last, we find unpersuasive defendants' argument that *Levy, supra*, and *Nugent, supra*, are not applicable to this case. Defendants distinguish those cases on the ground that they both involved routine, periodic services of the same type and nature, while the transaction between defendant [*12] Tolley and plaintiff was a unique, solitary event. Specifically, defendants argue:

> While Tolley did serve as general counsel for Azzar and his various business entities before and after the underlying business transaction took place, this role and the legal services he provided as general counsel were separate and completely distinct from the transaction, which was a one-time real estate investment occurring between close personal friends.

Although defendants attempt to distinguish the real estate transaction as a separate and unique occurrence between personal friends, defendants have failed to explain how the real estate transaction differs from defendant Tolley's representation of plaintiff as general counsel. MRPC 1.8(a) prohibits attorney-client business transactions unless the following requirements are met: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client; (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and (3) the client [*13] consents in writing. Moreover, the Michigan Supreme Court has held:

> The layman does not see the attorney remove his counsellor's hat and don that of the insurance man, or the shrewd businessman, or the lender of money. The uninformed regard the attorney as just that especially when he is met in the same surroundings, regarding the same business transactions, and without any semblance of warning that he is anything but their counsellor. [*Kukla v Perry*, 361 Mich. 311, 316; 105 N.W.2d 176 (1960).]

Therefore, because defendant Tolley never advised plaintiff that he was not serving as legal counsel for the real estate transaction, the attorney-client relationship remained in existence until July of 1999.

Furthermore, during his deposition, defendant Tolley admitted that from 1975 to June of 1999, he provided legal services to plaintiff and that his duties as general counsel for plaintiff's corporations included litigation supervision; supervision of files being handled by outside counsel; review of agreements; employment of outside counsel and reviewing employee issues. He also testified that he performed many non-legal tasks for plaintiff, [*14] such as providing employment or human-resource advice. The continuing legal relationship between defendant Tolley and plaintiff lends support for our finding that even if the real estate transaction arose out of a personal relationship between defendant and plaintiff, defendant Tolley was still plaintiff's general counsel, and was still owing a duty under the attorney-client relationship.

Therefore, because this case, like *Levy* and *Nugent*, involved a continuous legal relationship between defendant and plaintiff, ending in 1999, we find that plaintiff timely filed his legal malpractice claim within the limitations period.

Because the two-year statute of limitations period for plaintiff's May 2001 legal malpractice claim did not begin running until July of 1999, plaintiff's claim is not time barred. Thus, we reverse the order of the trial court granting summary disposition in favor of defendants.

Alternatively, defendant law firm argues that even if this Court finds plaintiff's malpractice claim was filed within the two-year statutory period, the trial court's grant of summary disposition in favor of defendants should be affirmed because plaintiff's legal malpractice claim [*15] is without merit due to the lack of an attorney-client relationship. We disagree.

To establish a successful claim of legal malpractice, plaintiff must plead and prove: 1) the existence of an attorney-client relationship; 2) negligence in the legal representation of plaintiff; 3) that the negligence was a proximate cause of an injury; and 4) the fact and extent of the injury alleged. *Persinger v Holst*, 248 Mich. App. 499, 502; 639 N.W.2d 594 (2001).

We find that the real estate transaction gave rise to an attorney-client relationship between defendant law firm and plaintiff. Generally, a client's employment of one member of a law firm is deemed to be employment of the firm itself. MCR 2.117(B)(3); *Mitchell v Dougherty*, 249 Mich. App. 668, 681; 644 N.W.2d 391 (2002). Here, defendant Tolley remained employed and was a shareholder of defendant law firm during his representation of plaintiff from 1993 to 1999. Furthermore, because defendant Tolley never limited the scope of his legal representation of plaintiff, a reasonable juror could conclude that the real estate transaction gave rise to an attorney-client [*16] relationship between defendant Tolley and plaintiff. Because Tolley was still acting as plaintiff's counsel on other matters, we conclude that there is no question of material fact that the real estate transaction gave rise to

an attorney-client relationship between defendants and plaintiff.

Furthermore, plaintiff supports his malpractice claim with the affidavit of attorney Jeffrey J. Seward, which provides that defendant Tolley, as a member of defendant law firm, was negligent in failing to reduce, to writing, the terms of the real estate transaction and by failing to secure an interest in the property for repayment purposes, that damages claimed by plaintiff were directly caused by defendants' conduct, and that defendant Tolley's conduct constituted a violation of *MRPC 1.8*.

Defendant law firm incorrectly challenges plaintiff's malpractice claim by arguing that alleged violations of Michigan Rules of Professional Conduct do not give rise to a civil cause of action and that plaintiff's alleged damages were not proximately caused by any conflicts of interest between defendant Tolley and plaintiff. Although *MRPC 1.0* provides that violations of the Michigan Rules of Professional Conduct [*17] do not give rise to a cause of action, this Court has found a rebuttable presumption that violations of the Code of Professional Conduct constitute actionable malpractice. *Beattie v Firnschild, 152 Mich. App. 785, 791; 394 N.W.2d 107 (1986)*.

We also find that defendant has provided no factual support to discredit Seward's conclusions. Furthermore, Tolley's testimony that he failed to reduce the terms of the loan transaction to writing and that he failed to suggest plaintiff seek independent legal counsel is evidence of defendant Tolley's negligence. Because the nonmoving party is obligated to provide specific factual support in challenging a motion for summary disposition, we conclude there are no questions of material fact that the record and the Seward affidavit give rise to a claim of legal malpractice against defendants.

Reversed and remanded. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Michael R. Smolenski

/s/ Bill Schuette

EXHIBIT 14

MCLS § 600.5805

This document is current through 2014 PA 166, 168-226, 228-248, 250-257, 259-287, 289-291, 293-314, 316-318, 320-324, 326-333, 335-337, 340, 342-361, 364, 367-372, 374-375, 377, 379-389, 391-392, 396-397, 400-407, 409-411, 414-416, 418-422, 425-426, 428-442, 445-447, 449

§ 600.5805. Injuries to persons or property; period of limitations; "dating relationship" defined.

Sec. 5805. (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

(2) Subject to subsections (3) and (4), the period of limitations is 2 years for an action charging assault, battery, or false imprisonment.

(3) The period of limitations is 5 years for an action charging assault or battery brought by a person who has been assaulted or battered by his or her spouse or former spouse, an individual with whom he or she has had a child in common, or a person with whom he or she resides or formerly resided.

(4) The period of limitations is 5 years for an action charging assault and battery brought by a person who has been assaulted or battered by an individual with whom he or she has or has had a dating relationship.

(5) The period of limitations is 2 years for an action charging malicious prosecution.

(6) Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.

(7) The period of limitations is 2 years for an action against a sheriff charging misconduct or neglect of office by the sheriff or the sheriff's deputies.

(8) The period of limitations is 2 years after the expiration of the year for which a constable was elected for actions based on the constable's negligence or misconduct as constable.

(9) The period of limitations is 1 year for an action charging libel or slander.

(10) Except as otherwise provided in this section, the period of limitations is 3 years after the time of the death or injury for all actions to recover damages for the death of a person, or for injury to a person or property.

(11) The period of limitations is 5 years for an action to recover damages for injury to a person or property brought by a person who has been assaulted or battered by his or her spouse or former spouse, an individual with whom he or she has had a child in common, or a person with whom he or she resides or formerly resided.

(12) The period of limitations is 5 years for an action to recover damages for injury to a person or property brought by a person who has been assaulted or battered by an individual with whom he or she has or has had a dating relationship.

(13) The period of limitations is 3 years for a products liability action. However, in the case of a product that has been in use for not less than 10 years, the plaintiff, in proving a prima facie case, shall be required to do so without benefit of any presumption.

(14) An action against a state licensed architect or professional engineer or licensed professional surveyor arising from professional services rendered is an action charging malpractice subject to the period of limitation contained in subsection (6).

(15) The periods of limitation under this section are subject to any applicable period of repose established in section 5838a, 5838b, or 5839.

(16) The amendments to this section made by 2011 PA 162 apply to causes of action that accrue on or after

January 1, 2012.

(17) As used in this section, "dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional involvement. Dating relationship does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context.

History

Pub Acts 1961, No. 236, Ch. 58, § 5805, by § 9911 eff January 1, 1963; amended by Pub Acts 1978, No. 495, imd eff December 11, 1978 (see 1978 note below); 1986, No. 178, imd eff July 7, 1986, by § 2 eff October 1, 1986 (see 1986 note below); 1988, No. 115, imd eff May 2, 1988; *2000, No. 2*, imd eff February 17, 2000 (see 2000 note below); *2000, No. 3*, imd eff February 17, 2000 (see 2000 note below); *2002, No. 715*, eff March 31, 2003; *2011, No. 162*, imd eff October 4, 2011, by enacting § 1 eff January 1, 2012; *Pub Acts 2012, No. 582*, eff January 2, 2013.

Annotations

Notes

Prior codification:

RS 1846, ch. 86, § 31; Pub Acts 1915, No. 314, ch. IX, § 13; 1927, No. 161; 1929, No. 183; 1937, No. 21; 1937, No. 193; 1941, No. 72; 1951, No. 21 (former § 609.13).

MSA § 27A.5805

Editor's notes:

See Editor's notes at act heading.

Pub Acts 1978, No. 495, § 2, imd eff December 11, 1978, provides:

"Section 2. This amendatory act shall not take effect unless House Bill No. 6541 of the regular session of the 1977–78 legislature [Act No. 506 of 1978] is enacted into law.".

Pub Acts 1986, No. 178, §§ 3(1), 4, imd eff July 7, 1986, by § 2 eff October 1, 1986, provide:

"Section 3. (1) Sections 2925b, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986.

"Section 4. This amendatory act shall not take effect unless House Bill No. 5209 of the 83rd Legislature [Act No. 173 of 1986] is enacted into law.".

Pub Acts 1988, No. 115, § 2, imd eff May 2, 1988, provides:

"Section 2. This amendatory act shall apply to cases commenced on or after July 1, 1988.".

Pub Acts 2000, No. 2, enacting § 1, imd eff February 17, 2000, provides:

"Enacting section 1. This amendatory act does not take effect unless House Bill No. 4524 of the 90th Legislature [*Act No. 3 of 2000*] is enacted into law. ".

Pub Acts 2000, No. 3, enacting § 1, imd eff February 17, 2000, provides: